NO. 91-840

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM 1991

MARY A. COLLINS,
Petitioner

v.

BAPTIST MEMORIALS GERIATRIC CENTER
and ODUS TAYLOR HENLEY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether employers such as Odus Henley and Baptist Memorials Geriatric Center should be required to clearly set forth specific, legitimate reasons for terminating an employee such as Mary Collins within a few hours after she openly opposes the sexual harassment of female employees by the employers.

II. Whether a female employee such as Mary Collins should be allowed to prove that the reason given for her firing was pretextual by showing indirectly that the employers' proffered explanation was unworthy of credence.

III. Whether, in proving a hostile environment claim, the law requires an onerous, higher standard of proof for the fired female employee in proving that the hostile working environment affected a term or condition or privilege of her employment.

IV. Whether in sexual harassment cases non-advisory jury findings on narrow state law issues, absent any instruction to the jury on Title VII standards and burden shifting guidelines, should be allowed as substitutes for specific fact findings by a district court under applicable Title VII standards and burden shifting guidelines.

V. Whether a district court should be required to make findings of fact using the correct Title VII standards and burden shifting guidelines in order to facilitate review.

LIST OF PARTIES

The parties to the proceeding below were:

Petitioner here, Plaintiff - Appellant, Mary A. Collins.

Respondents here, Defendants - Appellees, Baptist Memorials Geriatric Center and Odus Taylor Henley.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING WRIT 7

I. TITLE VII AND SUPREME COURT PRECEDENTS REQUIRE EMPLOYERS SUCH AS HENLEY AND THE CENTER TO CLEARLY SET FORTH SPECIFIC, LEGITIMATE REASONS FOR TERMINATION AN EMPLOYEE SUCH AS MARY COLLINS WITHIN A FEW HOURS AFTER SHE OPENLY OPPOSES THE SEXUAL HARASSMENT OF FEMALE EMPLOYEES BY THE EMPLOYERS. THE FIFTH CIRCUIT'S OPINION IS IN CONFLICT WITH THESE PRECEDENTS. 7

II. A FEMALE EMPLOYEE SUCH AS MARY COLLINS SHOULD BE ALLOWED TO

TABLE OF CONTENTS (continued)

Page

PROVE THAT THE REASON GIVEN FOR HER FIRING WAS PRETEXTUAL BY SHOWING INDIRECTLY THAT THE EMPLOYERS' PROFFERED EXPLANATION WAS UNWORTHY OF CREDENCE. THE FIFTH CIRCUIT'S OPINION IS IN CONFLICT WITH THE SUPREME COURT'S PRIOR DECISION AND WITH OTHER CIRCUITS. 12

III. THE FIFTH CIRCUIT IMPOSED A HIGHER STANDARD OF PROOF THAN THAT REQUIRED BY LAW ON COLLINS' PROOF THAT THE HOSTILE WORKING ENVIRONMENT AFFECTED A TERM OR CONDITION OR PRIVILEGE OF HER EMPLOYMENT. THIS CONFLICTS WITH SUPREME COURT PRECEDENT. 15

IV. THE FIFTH CIRCUIT ERRED IN ALLOWING THE NON-ADVISORY JURY'S LIMITED FINDINGS ON THE NARROW STATE LAW ISSUES TO BE SUBSTITUTED FOR FINDINGS ON THE FEDERAL LAW ISSUES THAT COULD BE ANALYZED UNDER THE APPROPRIATE TITLE VII STANDARDS AND BURDEN SHIFTING GUIDELINES. 19

TABLE OF CONTENTS (continued)

Page

V. IN ORDER TO FACILITATE REVIEW, DISTRICT COURTS SHOULD BE REQUIRED TO MAKE FINDINGS OF FACT UNDER THE CORRECT TITLE VII STANDARDS AND BURDEN SHIFTING GUIDELINES. 24

CONCLUSION 27

TABLE OF AUTHORITIES

CASES **Page**

Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3rd Cir. 1990) 18

Collins v. Baptist Memorials Geriatric Center, 937 F.2d 190 (5th Cir. 1991) 6,10,11,13,14,16,19,20,24

Jones v. Flagship International, 793 F.2d 714, 726 (5th Cir.), *cert. denied*, 479 U.S. 1064, 107 S.Ct. 952, 93 L.Ed.2d 1001 (1987) 11,15

King v. Palmer, 778 F.2d 878, 881 (D.C. Cir. 1986) . . . 12

McDonnell Douglas Corp. v. Greene, 411 U.S. 792, at 804-805, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) 8,12,26

McKnight v. General Motors Corp., 908 F.2d 104, 113 (7th Cir.) *cert. denied* ____ U.S. ____, 111 S.Ct. 1306, 113 L.Ed.2d 241 (1991) 22

Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 91 L.Ed.2d 49, 106 S.Ct. 2399 (1986) 16,18

Ratliff v. Governor's Highway Safety Program, 791 F.2d 394, 400 (5th Cir. 1986) 26

Redditt v. Mississippi Extended Care Centers, Inc., 718 F.2d 1381, 1386 (5th Cir. 1983) 26

Sabine Pilot Service, Inc. v. Hauck, 687 S.W.2d 733 (Tex. 1985) 20

TABLE OF AUTHORITIES (continued)

CASES **Page**

Smith v. Texas Department of Water Resources, 799 F.2d 1026 (5th Cir. 1986) 25

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1989, 67 L.Ed.2d 207 (1981) 8,9,11,12,13,17,20,23,26,27

United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 716, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983) 12

Winters v. Houston Chronicle Publishing Co., 781 S.W.2d 408 (Tex.Civ.App.—Houston [1st Dist.] 1989), affirmed 795 S.W.2d 723 (Tex. 1990) 21

Statutes and Rules

42 U.S.C. § 2000e - 2(a) (1964) 2,8

42 U.S.C. § 2000e - 3(a) (1964) 3,8

Federal Rule of Civil Procedure 52(a) 25

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Mary A. Collins ("Collins"), respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 2, 1991, rehearing denied on August 29, 1991.

OPINIONS BELOW

The August 2, 1991 opinion of the Court of Appeals for the Fifth Circuit was published at 937 F.2d 190. A copy of the opinion is attached hereto as Appendix A. The August 29, 1991 order of the Court of Appeals denying the Petition for Rehearing is attached hereto as Appendix B. The May 3, 1990 Judgment of the United States District

Court for the Northern District of Texas was unpublished. It is attached hereto as Appendix C. The District Court's unpublished May 3, 1990 Order stating its original finding of fact and conclusions of law is attached hereto as Appendix D. The District Court's Charge to the Jury on the state law issues and the corresponding jury findings is attached hereto as Appendix E.

JURISDICTIONAL STATEMENT

The judgment and opinion of the Court of Appeals for the Fifth Circuit was entered on August 2, 1991. The Petition for Rehearing was denied on August 29, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case is a sexual harassment case involving Title VII, in particular, 42 U.S.C. §2000e-2 (a) (1964), as follows:

> (a) It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's

> race, color, religion, sex, or national origin.

and 42 U.S.C. §2000e-3 (a) (1964), as follows:

> (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

On March 21, 1988, Mary A. Collins, Personnel Director, was fired by Baptist Memorials Geriatric Center (the "Center"). She was fired by its Executive Director, Odus Taylor Henley ("Henley"). The Center is a large retirement facility for the elderly, located in San Angelo, Texas. Henley was the top officer of the corporation. It has over 300 employees, some 275 of whom are women. Collins was fired within a few hours after she had provided to a member of the Center's Board of Trustees, Bill Denton ("Denton"), several typewritten statements concerning the sexual harassment of female employees at the Center by Henley. The statements she provided to Denton are attached hereto as Appendix F. To this date, the Center and Henley have never provided a specific reason for firing Collins on that day in which she was participating in an activity purportedly protected by Title VII, other than merely stating that she was fired for insubordination. They have

never provided any specifics concerning her alleged insubordination.

The severity of the sexual harassment perceived by women at the Center had already been noted by men in high-level positions at the Center, prior to the situation that led to the firing of Collins. The former Executive Vice President at the Center, Vic Rhoads ("Rhoads"), had been approached by several women and men at the Center who were concerned about Henley's physical touchings of his women employees. The women were concerned that their response to the physical touchings of them by Henley might affect their jobs. Henley's secretary, Mary Butts, was the recipient of a number of improper physical touchings by Henley that were seen at the workplace by several witnesses. Rhoads, himself, witnessed one such improper embrace between Henley and Mary Butts. Butts later told Rhoads she had to do what she had to do to keep her job. Other women employees were offended and upset by unwelcome touchings of their bodies by Henley. In 1987, Rhoads met with the Chairman of the Center's Board of Trustees, Frank Sanders, and told him charges of sexual harassment by Henley could be forthcoming from the Center's women employees. Sanders took no action.

The physical touchings being witnessed included women employees' breasts being touched by Henley, women employees' buttocks being touched by Henley, women employees' being pulled up in full frontal or sideways hugs by Henley, women employees' backs being rubbed by Henley, women employees' bra straps being popped and other instances of improper physical contacts by Henley. There were numerous witnesses at trial to these touchings. Instances involving Henley's offensive touchings of a woman volunteer and a woman selling furniture to the Center were also reported. The physical contacts of women employees by Henley were the subject of frequent discussions by the women employees of the

Center, many of whom were offended by it. Henley did not touch men in the same offensive manner. The current Executive Vice President, Wayne Merrill, had also discussed the matter with Vic Rhoads. Other Board members were also aware. Women employees were also reporting these offensive touchings by Henley to Collins, the Center's Personnel Director. Collins herself had also experienced Henley's unwelcome touchings. She had learned to put a desk between him and her or to stay out of the copy room with him. She was a witness to his offensive touchings of other women employees. She had complained to Rhoads before he left the Center. She wanted to post a written sexual harassment policy, but Henley would not allow it. All of this led up to Collins discussing the matter with the Equal Employment Opportunity Commission, an attorney and Board member Denton, beginning in December, 1987.

Wayne Merrill's secretary at the Center, Susan Myers, sent anonymous letters concerning the situation to Board members during this same time period. They are attached hereto as Appendix G.

In mid February, 1988 and in early March, 1988, while Collins was gathering the statements and carrying on discussions with Denton about the situation, Henley reprimanded her twice. He reprimanded her once for issuing "unauthorized" cash advances and once for "unauthorized" early release of a paycheck. Collins was not fired upon receiving these reprimands. The Center had a policy of requiring three reprimands prior to firing. As it turned out, Henley and the Center could not provide any specific basis for either of the earlier reprimands. In fact, all cash advances and early paycheck releases during this time were proven at trial to have had the authorization of Henley. There was no reason articulated by the Center for any action against Collins on the day she was actually fired. Henley and the Center relied solely on poor record-

keeping practices as the reason why they could not provide any specific basis for the firing of Collins.

After proceeding initially with the EEOC, Collins obtained the right to sue and she sued the Center and Henley on January 17, 1989. Trial proceeded in San Angelo, Texas on April 9-13, 1990 with the Title VII matters being tried to the District Court. State law issues, including the very narrow exceptions to the "at will" employment rule in Texas, were submitted to the jury. The District Court acknowledges that the Title VII issues were tried to it in its May 3, 1990 Order. See Appendix D. No request was ever made that the jury be an advisory jury. The jury found that the Center failed to exercise ordinary care in investigating and stopping sexual discrimination and harassment but found against Collins on her other state law claims.

On May 3, 1990 the District Court signed its Order making its findings of fact and conclusions of law with regard to Collins' federal law claims under Title VII. It is attached hereto as Appendix D. The District Court entered Judgment in favor of Henley and the Center. It is attached hereto as Appendix C. Collins then timely appealed the District Court's Order and Judgment to the United States Court of Appeals for the Fifth Circuit. On August 2, 1991 the Fifth Circuit affirmed the District Court's Judgment with regard to the retaliation and hostile environment claims but remanded to the District Court for further findings upon the quid pro quo claims. *Collins v. Baptist Memorials Geriatric Center*, 937 F.2d 190 (5th Cir. 1991) (hereinafter "*Collins*"). On August 29, 1991 the Fifth Circuit denied Collins' Petition for Rehearing. On the same date the District Court entered Additional Findings of Fact and Conclusions of Law taken verbatim from the Defendants' submittal on remand. The Additional Find-

ings of Fact and Conclusions of Law are now the subject of a second appeal to the Fifth Circuit. They are attached hereto, for the Court's information, as Appendix H.

At issue here is the decision of the Fifth Circuit affirming the District Court's Judgment and Order in favor of the Center and Henley on the retaliation and hostile environment claims. Those issues were first raised in the District Court. The Fifth Circuit has not required the Center and Henley to articulate legitimate, specific reasons for firing Collins. The Fifth Circuit ignored Collins' indirect evidence that the insubordination reason stated by the Center and Henley for firing her was clearly pretextual. The Fifth Circuit imposed a commensurately higher standard of proof for showing hostile environment. This conflicts with precedence that proof of a prima facie case is not an onerous burden. Both lower courts ignored precedential Title VII standards and burden shifting guidelines.

Because of the importance of establishing clear precedent, because of the Fifth Circuit's departure from United States Supreme Court precedent in this sexual harassment case and because of a conflict between the circuits on the use of indirect evidence to prove pretext, Petitioner has appealed.

REASONS FOR GRANTING THE WRIT

1. **TITLE VII AND SUPREME COURT PRECEDENTS REQUIRE EMPLOYERS SUCH AS HENLEY AND THE CENTER TO CLEARLY SET FORTH SPECIFIC, LEGITIMATE REASONS FOR TERMINATING AN EMPLOYEE SUCH AS MARY COLLINS WITHIN A FEW HOURS AFTER SHE OPENLY OPPOSES THE SEXUAL HARASSMENT OF FEMALE EMPLOYEES BY THE EMPLOYERS.**

THE FIFTH CIRCUIT'S OPINION IS IN CONFLICT WITH THESE PRECEDENTS.

Title VII, 42 U.S.C. §2000e-2 (1964), *et. seq.* protects employees in the workplace from sexual harassment. The United States Supreme Court set forth the shifting burden of proof guidelines in a discrimination lawsuit as follows:

> First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." . . .Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pre-text for discrimination.

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253-254, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207, 215 (1981) (hereinafter "*Burdine*"). Accord, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05, 93 S.Ct. 1817, 1825, 36 L.Ed.2d 668 (1973). 42 U.S.C. §2000e-3(a) (1964) makes it "an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . .".

Mary Collins turned in the written reports of harassment and discrimination that she had gathered to one of Baptist Memorials Geriatric Center's Trustees on the morning of March 21, 1988. Within a few hours of that purportedly protected activity, she was fired. The Center and

Henley state that the singular reason she was fired was because she was insubordinate. Other than making this conclusory statement, the Center and Henley could not provide any specifics of any event that prompted the termination of Collins. With regard to the day she was fired, no insubordination of any kind was identified. The Center and Henley attempt to refer back to two previous reprimands of Collins, weeks earlier, for approving unauthorized cash advances and releasing paychecks early without authorization, but they fail to identify or document any unauthorized advances or any unauthorized paycheck releases. In fact, the documentation shows that all cash advances and paycheck releases during that time period were fully authorized. Their failure to identify or document any instances of insubordination is allegedly due to poor record-keeping. The Fifth Circuit finds this level of proof by the employers acceptable. It requires nothing more of Henley and the Center in articulating specific, legitimate reasons for terminating Mrs. Collins. In this regard, the Fifth Circuit is in conflict with United States Supreme Court precedent.

The United States Supreme Court in *Texas Department of Community Affiars v. Burdine,* supra at 254-256 established a stricter standard of proof with regard to the showing that an employer must make of its non-discriminatory reasons for the adverse employment action at issue:

> . . . the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a **legitimate**, non-discriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. . . It is sufficient if the defendant's evidence raises a **genuine** issue of fact

> as to whether it discriminated against the plaintiff. To accomplish this, the defendant must **clearly** set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be **legally sufficient** to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. **The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.** Emphasis added.

Every employer previously faced with this burden in a Title VII case is now essentially instructed by the Fifth Circuit that a muddled, nonspecific allegation of insubordination such as that made against Mary Collins by Henley and the Center, supported by absolutely no documentation, will suffice in carrying this burden. In other words, no specifics and no documentation need be provided.

There is no evidence that any actual insubordination on the part of Mrs. Collins caused her to receive a third and final reprimand. The Fifth Circuit acknowledges Henley's admission that he cannot specifically identify anything that final morning that constituted insubordination by Mrs. Collins. *Collins,* at 194. How can the Center and Henley now be said to have framed the factual issue with sufficient clarity so that Mrs. Collins could demonstrate pretext on that day? What insubordination did she commit? The answer, none.

Furthermore, although the Center and Henley mouthed the word "insubordination" in connection with previous incidents involving cash advances and the issuance of a paycheck before payday, absolutely no specifics were provided. *Collins*, at 193. Collins is required to defend against non-specific allegations. How can she defend against the unknown? Employers, in taking guidance as it presently stands from the Fifth Circuit's opinion, are taught that less is better. Poor record-keeping and an absolute memory block will substitute for specific, clearly set forth, legitimate reasons for adverse employment decisions.

A broad application of Title VII should require much more of the employer. In fact, it is the belief of Collins that the United States Supreme Court in *Burdine, supra* did set forth a standard requiring more of employers than the District Court and the Fifth Circuit Court of Appeals have required of Henley and the Center in this instance. As the Fifth Circuit itself has stated:

> We are well aware that the provisions of Title VII must be construed broadly in order to give effect to Congress' intent in eliminating invidious employment practices. . . Moreover, since the enforcement of Title VII rights necessarily depends on the ability of individuals to present their grievances without the threat of retaliatory conduct by their employers, rigid enforcement of §704(a) is required.

Jones v. Flagship International, 793 F.2d 714, 726 (5th Cir.), *cert denied*, 479 U.S. 1065, 107 S.Ct. 952, 93 L.Ed.2d 1001 (1987). Rigid enforcement of Title VII requires more of employers than the Fifth Circuit and the District Court have required of Henley and the Center up to this point. The United States Supreme Court has expressly stated that more is required of employers.

Petitioner Collins' Petition for a Writ of Certiorari should be granted and, ultimately, the decision of the Fifth Circuit and the District Court on wrongful retaliation should be reversed and remanded. Henley and the Center have not even remotely met their burden. A strong Title VII requirement that employers be required to clearly and specifically articulate legitimate reasons for the discharge of a person within a few hours after she engages in a protected activity should be re-emphasized by this Court.

II. AN EMPLOYEE SUCH AS MARY COLLINS SHOULD BE ALLOWED TO PROVE THAT THE REASON GIVEN FOR HER FIRING WAS PRETEXTUAL BY SHOWING INDIRECTLY THAT THE EMPLOYERS' PROFFERED EXPLANATION WAS UNWORTHY OF CREDENCE. THE FIFTH CIRCUIT'S OPINION IS IN CONFLICT WITH THE SUPREME COURT'S PRIOR DECISION AND WITH OTHER CIRCUITS.

In *Burdine, supra* the United States Supreme Court stated that a plaintiff may succeed in showing pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* at 256. See *McDonnell Douglas Corp. v. Greene,* 411 U.S. 792, at 804-805, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). These direct and indirect methods of proving discriminatory intent were reiterated in *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 716, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983). As stated in *King v. Palmer,* 778 F.2d 878, 881 (D.C. Cir. 1986):

> *Burdine* makes it absolutely clear that a plaintiff who establishes a *prima facie* case of intentional

> discrimination and who discredits the defendants' rebuttal should prevail, even if he or she has offered no direct evidence of discrimination. . .Thus, the mandate of *Burdine* is clear: a district court may not require direct evidence of intentional discrimination as opposed to indirect evidence that carries the burden of persuasion by discrediting the defendants' rebuttal. Moreover, a district court may not require direct evidence of intentional discrimination as opposed to circumstantial evidence thereof.

The Fifth Circuit, in the present opinion with respect to the issue of retaliation, held Mrs. Collins to a standard of proof with regard to pretext that required her to prove directly that Henley and the Center had "retaliatory motive." The Fifth Circuit stated:

> In sum, the evidence produced at trial was complex, confusing and even contradictory. The resolution of the retaliatory motive issue turned largely on credibility choices. If, as he claimed, Henley had no knowledge that Collins was gathering the statements, then it would be difficult to attribute a retaliatory motive to him. And the strength of the circumstantial evidence of pretext turned largely on the "leak" conversation, a conversation denied by both Henley and Sanders. In fact, the only evidence of the "leak" conversation came from Myers and Collins. *Collins* at 194.

Thus, the Fifth Circuit has used a standard that limits the employee to proving directly that a discriminatory reason more likely motivated the employer. The "leak" conversation was direct evidence of discriminatory intent and there was contradictory evidence at trial. The Fifth Circuit

ignored and did not utilize, however, the uncontradicted pretext evidence under the indirect method allowed by the Supreme Court. In this respect it is in conflict with the Supreme Court and with the D.C. Circuit. According to those Courts, pretext can be shown indirectly by showing that the employer's proffered explanation is unworthy of credence. Mrs. Collins made an overwhelming showing that the proffered reason for her termination was unworthy of credence.

In its discussion on retaliation, the Fifth Circuit discusses at length the very evidence that proves that the Center's and Henley's proffered explanation of the termination of Mary Collins is unworthy of credence. *Collins*, at 193-95. Henley and the Center assert that Mary Collins was fired for insubordination. And yet, no witnesses could give any specific instances of insubordination. The Center by its own policy requires three reprimands prior to termination. It is uncontroverted that Henley could not identify any specific thing that prompted him to terminate Collins on the morning that she delivered the purportedly protected statements. The third reprimand is thus unsupported by even any phony reason. Furthermore, he could not justify his prior reprimands of Mrs. Collins because of alleged poor record-keeping. Mrs. Collins easily and thoroughly discredited the cash advance and early paycheck hoaxes put forward by the Center and Henley. The Center's and Henley's proffered explanation of insubordination is unsubstantiated and unworthy of credence. The evidence to that effect is not confusing and it was not contradicted. It was simply ignored by the lower courts.

The effect of the Fifth Circuit's holding, if left unchanged, is to allow employers to obtain credence for their proffered explanation simply by saying nothing and by pro-

viding no support. It allows doubts to be resolved in favor of the employer who provides no specifics. This should not be an acceptable standard. Title VII is to be and should be broadly construed to protect each and every individual. *Jones v. Flagship International, supra.* Employers must be held to a standard of substantiating their employment decisions with credible specifics. This should be required even more so where, as here, an employer fires an employee within hours of her engagement in a protected activity. The United States Supreme Court should grant Petitioner's petition and, upon final review of the case, reverse in favor of Mrs. Collins on the claim of retaliation and remand for further findings consistent with the Supreme Court's opinion.

III. THE FIFTH CIRCUIT IMPOSED A HIGHER STANDARD OF PROOF THAN THAT REQUIRED BY LAW ON MRS. COLLINS' PROOF THAT THE HOSTILE WORKING ENVIRONMENT AFFECTED A TERM OR CONDITION OR PRIVILEGE OF HER EMPLOYMENT. THIS CONFLICTS WITH SUPREME COURT PRECEDENT.

The Fifth Circuit, in its present opinion, states:

> At trial the weakest link in Collins' hostile environment claim became the issue of whether any physical contacts of Henley with other female employees altered a term of Collins' employment. . . Psychological well-being is a term, condition, or privilege of employment within the meaning of Title VII, but a claim based on psychological harm "requires a commensurately higher showing that the sexually harassing conduct was pervasive and destruc-

tive of the working environment." *Collins,* at 195.

The Fifth Circuit under this self-imposed higher standard went on to conclude that the evidence presented by Collins and its effect on the psychological terms of her own working environment was far from compelling. The Fifth Circuit cited the jury's finding that the Center's negligence under state law was not a proximate cause of damages to Collins in support of its determination of this Title VII question.

The United States Supreme Court has recognized the hostile environment theory as the basis for a sexual harassment case. *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 91 L.Ed.2d 49, 106 S.Ct. 2399 (1986). The standard being applied by the Fifth Circuit in a hostile environment case is obviously too high where, in an instance such as this, it does not protect a female employee from a hostile environment in the work place. Much of the proof presented by Collins in this regard was not even discussed by the Fifth Circuit. When Collins first went to work in early 1986 at the Center, she was personally subjected to the physical gropings of Henley. [It is interesting to note that the District Court acknowledges this and characterizes it as harassment in its most recent Additional Findings. See Appendix H.] She testified that she learned to put a desk between her and him and to stay out of the copy room with him. Even Vic Rhoads, the former Executive Vice-President of the Center, testified about Collins coming to him and complaining and about his advice to Collins to keep some distance between Henley and herself. This alone is compelling evidence that the terms, conditions or privileges of her employment were altered. There was more.

Many employees came to Collins to relate their

troubles caused by Henley's groping of his female employees. In late 1987 when Collins began gathering information at Trustee Bill Denton's request, she was already troubled enough to contact the Equal Employment Opportunity Commission. She also made an initial contact with an attorney at that time. She was advised by the EEOC to begin to document occurrences affecting her on the job. She did so. The increasing mistreatment of her by Henley was documented in her personal memos to her file marked as Plaintiff's Exhibits 87-93. During this time Collins was frequently discussing the incidents of sexual harassment with Trustee Denton over the phone. Denton, in turn, was talking to others at the Center about the complaints. He even discussed such matters in general with Henley and Wayne Merrill. Collins was then reprimanded twice by Henley, without any substantiated basis. Finally, she was fired within hours of filing the reports of sexual harassment that she had obtained for Trustee Bill Denton. Collins testified at trial about the mental anguish she suffered during this period of time.

Title VII is not to be narrowly construed. It is to be broadly construed. The burden of establishing a prima facie case is not onerous, as the Fifth Circuit is implying. *Burdine*, at 253-54. The Fifth Circuit's onerous standard for proving hostile environment discrimination is thus in conflict with United States Supreme Court precedent. A simple preponderance of the evidence standard should be the rule.

By any standard, high or low, Mary Collins has demonstrated that the hostile environment for women that existed at the Center affected a term or condition or privilege of her employment. An employee who is not psychologically affected does not begin gathering statements of the important nature of these statements

about her boss. She does not contact the Equal Employment Opportunity Commission. She does not keep memoranda in a file documenting troubling instances at work during the same period of time. She does not consult with an attorney. She does not have to worry about staying out of the copy room with her boss or putting a desk between him and her. She is not the recipient of statements about harassment from troubled co-workers. She does not receive unsubstantiated reprimands. She is not fired. All of these are proof of the psychological effect of these occurrences on Mrs. Collins. The Supreme Court in no way limited this concept to intimidation or ridicule of an explicitly sexual nature. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3rd Cir. 1990). The standard to which she is being held in proving her claim of hostile environment as applied by the Fifth Circuit is simply too high and is contrary to the requirements of Title VII.

Furthermore, equating the jury's answer to the state law proximate cause of damages question on the negligence issue with a finding that the conduct by Henley toward other female employees was not sufficiently severe or pervasive to alter the psychological terms of Collins' own working environment is a comparison of apples and oranges. The damages part of the state law question infers a monetary answer. It is about tangible damage. Title VII covers intangible harm as well. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. at 64. The state law question was not a psychological well being question. It was not a term, condition or privilege question in the broad sense. A state law proximate cause question involves hurdles not placed in an employee's way by Title VII. A showing of a state law proximate cause of monetary damages should not be necessary for a woman to prove her prima facie case of hostile environment discrimination and to shift the burden to the employers for rebuttal.

The Fifth Circuit was correct when it stated that, "The district court's failure to confront the factual issues directly is troublesome." *Collins,* at 195. Similarly troubling is the Fifth Circuit's imposition of its higher standard and its own failure to confront the factual issues directly. Title VII should not be held to impose such higher standards. The hurdles which women have to clear in the work place are sufficiently high, without making them any higher. The United States Supreme Court should grant the Petition and, upon final review, re-affirm that the evidence of hostile environment should be reviewed on the less onerous basis it has established in the past, not on some higher standard. The judgment of the Fifth Circuit on hostile environment should be reversed and remanded for review in light of the correct standard.

IV. THE FIFTH CIRCUIT ERRED IN ALLOWING THE NON-ADVISORY JURY'S LIMITED FINDINGS ON THE NARROW STATE LAW ISSUES TO BE SUBSTITUTED FOR FINDINGS ON THE FEDERAL LAW ISSUES THAT COULD BE ANALYZED UNDER THE APPROPRIATE TITLE VII STANDARDS AND BURDEN SHIFTING GUIDELINES.

In its search to find some basis for the District Court's ultimate findings, the Fifth Circuit states:

> The jury found that Collins was not fired for reporting acts of harassment and discrimination or for refusing to ignore harassment and discrimination. The jury also found, however, that the Center had failed to exercise ordinary care in investigating and stopping harassment and discrimination. Reconciling the findings,

> as we must, the jury presumably believed that there was misconduct but that Collins was not fired for opposing it. *Collins* at 192.

Although the jury was not instructed on the shifting burdens of proof outlined by the United States Supreme Court in *Burdine, supra*, the Fifth Circuit treats the state law issues submitted to the jury as though they were parallel. The state law issues submitted on wrongful discharge to the jury are *not* parallel issues to the Title VII federal issues that were to be determined by the district court.

The two wrongful discharge questions were premised on Texas' very narrow exception to the "at will" doctrine as stated in *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985). In that case, the Texas Supreme Court held that an employee's refusal to perform an illegal act was an exception to the "at will" doctrine if the termination was based solely on that factor. The "at will" doctrine in Texas allows an employer to terminate an employee for any cause or no cause. Question No. 3 in the present case was based specifically on that very narrow Texas exception to the "at will" rule.[1] The underlying premise behind the question was that Collins' refusal to ignore the sexual harassment and discrimination occurring at the Center would have been an illegal act on her part as a Personnel Director of the Center.

Question No. 1 was also *not* a parallel question to any

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[1] Question No. 3 to the jury was "Was Mary Collins wrongfully terminated by the Center for refusing to ignore sexual harassment and discrimination?" The jury answered, "No".

Title VII issue.[2] Rather, it was premised upon the Texas Supreme Court's decision to review the Texas Court of Appeals decision that an extension of the foregoing exception to the Texas "at will" rule did not protect employees who merely reported illegal acts to their employers. *Winters v. Houston Chronicle Publishing Co.*, 781 S.W.2d 408 (Tex.Civ.App.—Houston [1st Dist.]), affirmed, 795 S.W.2d 723 (Tex. 1990). At Collins' trial, the Texas Supreme Court had not yet affirmed the Texas Court of Appeals holding in *Winters*. It is error by the Fifth Circuit to equate questions submitted under these very narrow exceptions to the harsh Texas "at will" rule to the intricate, sensitive questions to be posed to a District Court under Title VII.

The Fifth Circuit apparently infers from the jury's findings that Collins was not fired for reporting acts of harassment and discrimination and that the jury found there was some other basis for her firing, i.e. perhaps insubordination. In light of what happened at trial, this is a highly speculative reconciliation by the Fifth Circuit. Shortly after it recessed, the jury's foreman sent out the following question:

> Are we supposed to determine what sexual harassment is or is it defined by law and if so, what is the legal definition?

The District Court responded by instructing the jury with an instruction, based loosely on EEOC regulations, as to what types of unwelcome sexual advances, requests for sexual favors and other conduct of a sexual nature constitute sexual harassment. The jury in the present case was obviously attempting to determine whether or not the

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[2] Question No. 1 to the jury was, "Was Mary Collins wrongfully terminated by the Center for reporting acts of harassment and discrimination?" The jury answered "No".

reports that Mary Collins turned in to Trustee Bill Denton were reports of sexual harassment and discrimination. The jury could very well have concluded that she was fired for filing the reports she filed and, yet, still have answered the questions in the negative. One logical conclusion that the jury could have reached in answering "No" to the questions was that Mary Collins was *not* reporting acts of harassment and discrimination, as defined by the District Court. Or it could have found the reported conduct was welcome. (Mr. Henley's secretary, for instance, apparently accepted the conduct. Other witnesses for the Center found it acceptable as well). Since the jury, after its first question was answered by the District Court, may have concluded the reports turned in by Mrs. Collins did not have the defined character, then it may have felt it had to answer "No" to the questions.

Considering the question that was asked by the jury, the Fifth Circuit's reconciliation of the jury's state law findings does not necessarily follow from those findings. The Fifth Circuit found substantial support of the District Court's findings in the jury's findings. The Fifth Circuit relied on *McKnight v. General Motors Corp.*, 908 F.2d 104, 113 (7th Cir.), *cert. denied* ____ U.S. ____, 111 S.Ct. 1306, 113 L.Ed.2d 241 (1991) in determining that a remand for explicit findings was not required on the basis that it is clear from the record and the jury's verdict what the jury must have found. The Fifth Circuit went on to imply that the jury had attendant credibility choices in arriving at what the Fifth Circuit viewed as parallel state claims. In fact, the jury may well not have been making any credibility determinations in answering the questions. The jury may well have determined its answer to the questions solely on an analysis of the type of reports that Mrs. Collins filed with Trustee Bill Denton.

The jury's findings on these narrow state law issues are not an adequate substitute for findings from the District Court on the employer's burden to clearly set forth specific, legitimate reasons for its termination of Collins and on Collins' showing that the sole reason tendered by the Center and Henley for her termination was unworthy of credence. The jury was not instructed to make this analysis. The District Court did not do so. The Fifth Circuit did not do so. Despite the Supreme Court's holding in *Burdine, supra*, the lower courts have allowed the employer to escape without a credible explanation for firing Collins. The lower courts have avoided altogether Collins' proof that the reason given was a mere pretext. The jury's answers do not fill in these gaps.

The jury was not an advisory jury. However, both lower courts are using it as such. This is totally improper. Had Plaintiff known it was going to be used as an advisory jury, she could have requested detailed instructions to the jury on the Title VII issues and burden shifting guidelines. It is not clear from the record and the jury verdict what the jury must have found. The District Court's incorporation of the jury's decision on the two wrongful discharge state issues is thus an inadequate substitute for specific findings of fact under well developed Title VII law by the District Court. As stated in the preceding section, the Fifth Circuit should also not substitute a state law proximate cause of monetary damages question for specific findings on the intangible effects of the hostile environment on Collins. The United States Supreme Court should grant the Petition and, after a full review of the case, reverse on both the retaliation and hostile environment claims in favor of Collins. This Court should not permit the substitution of speculative reconciliations of non-advisory jury findings on narrow state law issues for specific findings by the District Court on the Title VII issues.

V. IN ORDER TO FACILITATE REVIEW, DISTRICT COURTS SHOULD BE REQUIRED TO MAKE FINDINGS OF FACT UNDER THE CORRECT TITLE VII STANDARDS AND BURDEN SHIFTING GUIDELINES.

The struggle that an appellate court is put to when a district court does not make adequate, supporting findings of fact is evident throughout the *Collins* opinion. For example, the Fifth Circuit states, "Some of the district court's factual findings are sketchy if read alone." *Collins* at 192. It goes on. "The District Court's failure to confront the factual issues directly is troublesome." *Collins* at 195. With regard to the quid pro quo claim, the Fifth Circuit actually remanded to the District Court for further findings because "none of the state law claims paralelled the quid pro quo claim." *Collins* at 197.

The District Court's eighteenth finding was its only independent finding of fact. See Appendix D. It adopted the pretrial suggestions of Henley and the Center in whole as its other "findings of fact." Its only independent finding of fact shows that it was not analyzing the evidence presented under the correct Title VII standards of law. The Fifth Circuit refers to this sole independent finding by the District Court on page 195 of its opinion:

> The district court concluded the "uncontroverted testimony" showed that Henley was a "demonstrable" person and that there was no evidence that he was an abuser or molester of women, no evidence that he sought sexual favors from Collins or others, and no evidence that he was lewd or suggestive to Collins. *Collins,* at 195.

Title VII does not require that an employer be an abuser or molester of women in order to be found in violation of

Title VII. It does not require that the employer be proven to have sought sexual favors from the employee. The fact that the District Court stated these as findings of fact in support of its ultimate conclusions of law shows quite simply that the District Court either did not understand Title VII or was totally ignoring the applicable statutes and case law that had developed under Title VII. A more sensitive analysis is required by Title VII. Sexual harassment takes many forms.

The Fifth Circuit is not following Federal Rule of Civil Procedure 52(a) or its own precedent as stated in *Smith v. Texas Department of Water Resources*, 799 F.2d 1026 (5th Cir. 1986) in which it stated:

> What remains of the trial court's findings and conclusions is simply the statement that Plaintiff's failure to perform part-time secretarial relief work was "a valid business reason" for her discharge, and that any contrary evidence of sex discrimination is not credible. This is inadequate.
>
> Federal Rule of Civil Procedure 52(a) requires the trial court to "find the facts specially." The findings must be explicit enough to allow for appellate review:
>
> "If the trial court believes the employer's explanation of its motivation, the courts may not merely state, in conclusory terms, that the plaintiff has failed to prove the employer's suggested reason to be a pretext for invidious discrimination or that there is no evidence of discriminatory treatment. It must at least refer to the evidence tending to prove and disprove the merits of the proffered explanation and state why the court reached the conclusion that the explanation has not been discredited."

Ratliff v. Governor's Highway Safety Program, 791 F.2d 394, 400 (5th Cir. 1986).

As stated in *Redditt v. Mississippi Extended Care Centers, Inc.*, 718 F.2d 1381, 1386 (5th Cir. 1983):

"In reviewing the district court's finding of no discrimination under the clearly erroneous standard, this Court cannot be left to second guess the factual basis for the district court's conclusion. This Court cannot determine whether the district court's finding that Plaintiff failed to demonstrate pretext was clearly erroneous when the district court's finding is not expressed with sufficient particularity. It is not the function of this Court to make credibility choices and findings of fact."

The Fifth Circuit, in analyzing the retaliation and hostile environment claims, did not instruct the District Court to make specific findings under the precedential framework established by this Court. That would be the burden shifting guidelines outlined in *Burdine, supra* and *McDonnell Douglas Corp. v. Greene, supra.* Had it done so, when the District Court returned its more specific findings of fact, the Fifth Circuit would then have been able to analyze the findings without having to make the troublesome, speculative reconciliations and assumptions upon which its present opinion is based. The purposes of Title VII and Rule 52(a) would have been served. Such an analysis would have shown the obvious weakness in the Center's and Henley's case. They have no credible explanation of why Mary Collins was fired just a few hours after she openly opposed the sexual harassment of women by Henley at the Center. The lower courts are obscuring that simple fact with onerous standards of proof and unjus-

tifiable reconciliations of the evidence. The United States Supreme Court should reinforce its precedents in Title VII cases by reversing the Fifth Circuit in this case and remanding the case for further specific findings of fact.

CONCLUSION

The Fifth Circuit Court of Appeals has taken a step back from established United States Supreme Court and Title VII precedents. A clear message needs to be sent to employers with this case that Title VII does provide strong protections to employees. Where an employee, such as Mary Collins, is fired within a few hours of opposing sexual harassment, the employer must be able to specify legitimate, non-retaliatory reasons for the taking of such an action. The failure to state any specific reason should not be allowed to suffice. Poor record-keeping should not be allowed as an excuse for failure to provide specifics. Otherwise, Title VII protection against wrongful retaliation will be made meaningless.

The Supreme Court should reiterate that its well established guidelines for analyzing such cases under *Burdine, supra* do have meaning. District courts should be instructed to make specific findings of fact under those guidelines. Non-advisory jury determinations of narrow state law issues should not be allowed as substitutes for district court analysis and findings using the appropriate Title VII standards and the *Burdine* shifting guidelines.

Also, the higher standards of proof suggested by the Fifth Circuit for proving pretext and for proving a prima facie case of hostile environment discrimination should be rejected. Direct or indirect proof by the fired employee who opposed sexual harassment should be allowed to prove the employer's proffered reasons for the firing were pretextual.

Mary Collins met this burden. A non-onerous burden of proof on hostile environment cases should be imposed rather than the commensurately higher standard imposed by the Fifth Circuit. Mary Collins proved a hostile environment affected her terms of employment, using ordinary, non-onerous standards.

In this case, Mary Collins proved the reason given for her firing by Baptist Memorials Geriatric Center and Odus Taylor Henley was pretextual. They couldn't articulate any specific reason for her actual firing, let alone a legitimate reason. She openly opposed sexual harassment. She was fired a few hours later. Title VII should protect her and women who may find themselves similarly situated in the future. The United States Supreme Court should grant this Petition and reverse in favor of Mary Collins. The case should then be remanded for further consideration in light of the Supreme Court's opinion.

Respectfully submitted,

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NO. 91-840

Supreme Court, U.S.
FILED
NOV 21 1991
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In the Supreme Court of the United States

OCTOBER TERM 1991

MARY A. COLLINS,
Petitioner

v.

BAPTIST MEMORIALS GERIATRIC CENTER
and ODUS TAYLOR HENLEY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

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TABLE OF CONTENTS

APPENDIX A - August 2, 1991 Opinion of United States Court of Appeals for the Fifth circuit A-1

APPENDIX B - August 29, 1991 Denial of Petition for Rehearing A-16

APPENDIX C - May 3, 1990 Judgment of United States District Court for the Northern District of Texas A-18

APPENDIX D - May 3, 1990 Order of the District Court A-20

APPENDIX E - District Court's Charge to the Jury A-28

APPENDIX F - Plaintiff's Exhibits 1-7 (Seven of the statements Collins delivered to Denton) A-49

APPENDIX G - Plaintiff's Exhibits 22-27 (The letters mailed independently by Susan Myers) A-57

APPENDIX H - August 29, 1991 Additional Findings of Fact and Conclusions of Law by District Court on remand. A-70

APPENDIX A

Mary A. COLLINS,

Plaintiff-Appellant,

v.

BAPTIST MEMORIALS GERIATRIC CENTER and Odus Taylor Henley,

Defendants-Appellees.

No. 90-1396

United States Court of Appeals,

Fifth Circuit,

Aug. 2, 1991.

Former employee brought suit against employer and supervisor, asserting sexual harassment claim under Title VII, arising from her termination. The United States District Court for the Northern District of Texas, Samuel Ray Cummings, J., found for defendants on Title VII claim, and jury found for defendants on parallel state claims. Plaintiff appealed. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) district court's finding that plaintiff's termination was not in retaliation for opposition to sexual harassment was not clearly erroneous; (2) plaintiff did not establish sexual harassment claim based on hostile environment; and (3) remand was necessary for further factual findings regarding sexual harassment claim, insofar as claim was asserted under quid pro quo theory.

Affirmed in part, vacated and remanded in part.

Appeal From the United States District Court for the Northern District of Texas.

Before GOLDBERG, HIGGINBOTHAM, and JONES, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Mary Collins appeals an adverse judgment on her Title VII sexual harassment claim. At trial, she developed three theories in support of the claim—retaliation, hostile environment, and quid pro quo. The essence of her claim is that the executive Director of the Baptist Memorial Geriatric Center sexually harrassed female employees and fired her for opposing the harassment. Defendants deny harassment and urge that Collins was fired for insubordination. Most of the issues on appeal relate to the sufficiency of the evidence in support of the district court's judgment. A jury rejected several parallel state claims. We affirm the judgment against Collins insofar as her claim rested on theories of retaliation and hostile environment, but remand for additional findings on the theory of quid pro quo. Collins did not appeal the judgment dismissing her state claims.

I.

Baptist Memorial Geriatric Center hired Mary Collins as personnel director in February of 1986. She asserts that during her tenure as personnel director, she became concerned with the conduct of the Center's executive director, Odus Henley, eventually discussing Henley's relationship with his secretary and his conduct toward other female employees with a member of the Board of Trustees, Bill Denton. There was evidence that Denton asked for more facts before bringing the matter before the Board,

and Collins began gathering statements from female employees at the Center in December of 1987. Although several of the statements are largely directed to Henley's relationship with his secretary, the statements also document tight hugs and other physical contacts with female employees generally. Susan Myers, secretary to executive vice president Wayne Merrill, independently mailed a number of anonymous letters to the Board concerning Henley at about the same time.

On March 21, 1988, shortly after Collins delivered the statements to Denton, Henley fired her. He had earlier issued two formal reprimands. On February 15, 1988, he reprimanded Collins for "[a]pproval or and request for unauthorized salary advances to employees over a period of time." And on March 11, 1988, he reprimanded her for "[a]ssuming authority which had been specifically forbidden and reserved to only the Executive Director who was on duty or the Executive Vice President." Henley issued a third formal reprimand when he fired Collins. At trial, Henley testified that he fired Collins for insubordination. She contends that his real motive was retaliation for her opposition to his conduct toward female employees. The Board of Trustees gave Henley a vote of confidence.

Collins filed this suit against Henley and the Center, alleging both Title VII and state law violations, on January 17, 1989. The Title VII claim was tried to the district court, and the state claims to the jury. The jury found that Collins was not fired for reporting acts of harassment and discrimination or for refusing to ignore harassment and discrimination. The jury also found, however, that the Center had failed to exercise ordinary care in investigating and stopping harassment and discrimination. Reconciling the findings, as we must, the jury presumably believed that there was misconduct but

that Collins was not fired for opposing it. The jury awarded no damages on the breach of care claim, finding that the Center's negligence was not a proximate cause of damage to Collins, and found for the defendants on the remaining state claims.

The district court similarly found for the defendants on the Title VII claim. Some of the district court's factual findings are sketchy if read alone. The court also adopted the jury's findings and cited them in support of its own conclusions. The district court entered judgment for the defendants. Collins appeals the adverse judgment on the Title VII claim to this court but not the judgment on the state claims entered on the jury's verdict.

II.

The parties make much of the shifting burdens of proof outlined by the Supreme Court in *Texas Department of Community Affairs v. Burdine*,[1] and *McDonnell Douglas Corp. v. Green*.[2] The case has been fully tried on the merits. "On appellate review of a fully tried case, we do not concern ourselves with the shifting burdens of proof that are relevant at trial. Rather, we limit our review to the district court's findings on the ultimate question of discrimination vel non."[3] Collins bore the ultimate burden of persuasion on her Title VII claim, a burden that the

[1] 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

[2] 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

[3] *Johnson v. Harris County Flood Control District*, 869 F.2d 1565, 1571 (5th Cir. 1989); *see also Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 67, 107 S.Ct. 367, 371, 107 S.Ct 367, 93 L.Ed.2d 305 (1986); *U.S. Postal Service Bd. of Governors v. Aiken*, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983); *Comeaux v. Uniroyal Chemical Corp.*, 849 F.2d 191, 193 (5th Cir.1988).

district court believed she had not met.[4]

III.

At trial, Collins developed three theories in support of her Title VII claim—retaliation, hostile environment, and quid pro quo. We address each in turn.

A. *The retaliation claim.*

[1] A plaintiff must show three things to establish a prima facie case of retaliation—that she engaged in an activity protected by Title VII, that an adverse employment action followed, and that there was some causal connection between the activity and the adverse action.[5] Collins' opposition to perceived harassment was a protected activity even in the absence of a hostile environment or quid pro quo actionable under Title VII.[6] At trial, then, whether there was a causal connection between Collins' opposition to Henley and her termination was a major trial issue. Collins need not have established that her protected activity was the sole factor motivating the termination, but the burden was on her to show that " 'but for' the protected activity she would not have been subjected to the action which she claims."[7]

[2] Henley and the Center asserted at trial that Collins was fired for insubordination.[8] When pressed, Henley

[4] *See Burdine*, 450 U.S. at 256, 101 S.Ct. at 1095.

[5] *Jones v. Flagship International*, 793 F.2d 714, 724 (5th Cir.1987).

[6] *Id.* at 727-28.

[7] *Jack v. Texaco Research Center*, 743 F.2d 1129, 1131 (5th Cir.1984).

[8] Several of the witnesses aligned with the defense also mentioned a "personality conflict" between Henley and Collins. Collins conceded

could identify only two specific examples of insubordination, approving cash advances and releasing early paychecks. Henley admitted that he had initially authorized Collins both to approve cash advances and to release early paychecks. He could not point to the date on which he rescinded either authorization, document the fact that he rescinded the authorization, or identify any employees receiving unauthorized advances or early paychecks. Henley attributed his inability to document the unauthorized advances and early paychecks to poor record-keeping.

Collins testified that she generally sent all employees requesting cash advances to Henley or Merrill for approval, but that Henley had told her that she need not do so with small advances. She believed that her first reprimand resulted from a misunderstanding. Henley conceded that all of the cash advances produced from the relevant time period were signed either by himself or by Merrill. Collins also testified that Henley had authorized her to release early paychecks in emergency situations and that he did not revoke the authorization until the second reprimand.[9]

Footnote 8 continued.

that here were tensions between herself and Henley, but claimed that the tensions developed at about the time that she began gathering the statements from female employees. To the extent that a "personality conflict" arose because of Collins' protected activities, rather than independently, the conflict would not provide a legitimate reason for Collins' termination.

[9] Most of the other witnesses at trial, even those aligned with the defense, testified that they had not witnessed any instances of insubordination and that Collins was a good worker. Merrill and former executive vice president Vic Rhoades stated that Collins retained a professional demeanor, suffered no deterioration in her work, and never became insubordinate to them. Kay Wright, assistant personnel director to Collins and personnel director at the time of trial, testified that Collins was personable, likeable, and professional; she had never witnessed

Collins also countered with circumstantial evidence that the defendants' allegations of insubordination were a pretext for retaliation. She testified that she delivered the statements to Denton on the morning that she was terminated. While she was in Denton's office. Denton called the Chairman of the Board, Frank Sanders, and told him that he had the statements and would bring them to Sanders that day. She then returned to the Center and, shortly thereafter, received a phone call from Myers. Myers told her that "Mr. Merrill had come across the hall from Mr. Henley's office and told her that Mr. Henley was extremely angry that he was outraged; that he had never seen him as mad as he was; that Frank Sanders had called Mr. Henley and told him about the reports being turned over to Bill Denton, and that he had told him to plug the leak in personnel." Myers corroborated this statement in her testimony, adding that "[t]here was more than one conversation about leaks in the personnel department." Henley terminated Collins later the same morning.

Henley was unable to identify the "final thing" that prompted him to terminate Collins. He admitted meeting with Merrill that morning, for unrelated reasons, but denied speaking to Sanders. Merrill could not remember if he had spoken to Sanders that morning. He testified that Sanders had mentioned a "leak" to him on another occasion; Sanders was then referring to "an anonymous letter that spelled out some salaries, and they were to the

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Footnote 9 continued.

any acts of insubordination. Sanders and Henley's secretary, Mary Butts, also testified that they had not witnessed any acts of insubordination. Like Henley, neither Merrill nor Wright could identify any unauthorized cash advances or early paychecks.

penny."[10] Sanders denied entirely having spoken with either Henley or Merrill that morning about a "leak" in personnel. He testified that he had received the statements from Denton either that morning or the night before. Although Denton could not remember when he delivered the statements at the time of his deposition, he testified at trial that the had delivered them to Sanders' home at about 5:00 p.m. on the day Collins was fired.

Henley denied knowing that Collins had been gathering statements when he fired her. Denton testified that he never told Henley, Merrill, or Sanders that Collins was the source of the statements. On the other hand, he did discuss the situation without naming Collins with Henley, Merrill, Henley's pastor, a number of the Center's employees and several Board members. Collins was convinced that Henley connected her to the statements because his attitude toward her changed in December of 1987, about the time that she began gathering the statements.

In sum, the evidence produced at trial was complex, confusing, and even contradictory. The resolution of the retaliatory motive issue turned largely on credibility choices. If, as he claimed, Henley had no knowledge that Collins was gathering the statements, then it would be difficult to attribute a retaliatory motive to him. And the strength of the circumstantial evidence of pretext turned largely on the "leak" conversation, a conversation denied by both Henley and Sanders. In fact, the only evidence of the "leak" conversation came from Myers and Collins.

The district court concluded simply that "Mrs.

[10] The "leak" references could conceivably relate to disclosures of confidential information rather than sexual harassment charges. But the defendants did not articulate breaches of confidentiality as a reason for terminating Collins. Collins denied leaking any confidential salary information.

Collins was terminated by Mr. Henley for insubordination." In the absence of the parallel state claims, we might have remanded to the district court for further findings pursuant to Fed.R.Civ.P. 52(a). Rule 52(a) " 'exacts neither punctilious detail nor slavish tracing of the claims issue by issue and witness by witness,' but it does require findings that are explicit and detailed enough to enable us to review them under the applicable standard."[11]

In this case, however, the jury's findings on the parallel state claims lend substantial support to the district court's findings. As stated by the Seventh Circuit in *McKnight v. General Motors Corp.*,[12] "[if] it is clear from the record and the jury's verdict what the jury must have found and therefore what the district judge, in registering agreement with the verdict, must also have found, a remand for explicit findings is not required, because it would add nothing to the information that the appellate court already has." We are persuaded that the findings are not clearly erroneous and the attendant credibility choices were within the province of the jury.

B. *The hostile environment claim.*

[3] A plaintiff must show five things to establish a prima facie case of sexual harassment under a hostile environment theory—that she belongs to a protected group, that she was subject to unwelcome sexual harassment, that the harassment was based on sex, that the harassment affected a term or condition or privilege of employment and

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[11] *Lopez v. Current Director of Texas Economic Development Com'n*, 807 F.2d 430, 434 (5th Cir.1987) (quoting *Ratliff v. Governor's Highway Safety Program*, 791 F.2d 394, 400 (5th Cir.1986)).

[12] 908 F.2d 104, 113 (7th Cir.1990)

if appropriate, some ground to hold the employer liable.[13] At trial the weakest link in Collins' hostile environment claim became the issue of whether any physical contacts of Henley with other female employees altered a term of Collins' employment.

[4] Collins conceded that Henley only hugged her and then only during a short period when she first began working at the Center. She urged that Henley's contact with other female employees affected the psychological terms of her employment. Psychological well-being is a term, condition, or privilege of employment within the meaning of Title VII, but a claim based on psychological harm "requires a commensurately higher showing that the sexually harrassing conduct was pervasive and destructive of the working environment."[14] And harassing incidents not involving Collins herself will not sustain her claim, unless there is evidence that the incidents involving other female employees "affected [her own] psychological well-being."[15]

[5] At trial, Collins presented a number of witnesses who testified to Henley's physical contacts with female employees. Although Henley and his secretary denied any special relationship, several witnesses observed them in questionable circumstances. Most of the witnesses observed Henley tightly hugging female employees or rubbing their backs. Of the plaintiff's witnesses who were themselves hugged by Henley, Kay Wright welcomed the hugs as non-sexual expressions of friendship, but the rest

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[13] *See Jones*, 793 F.2d at 721-22; *compare Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66-67, 106 S.Ct. 2399, 2405-06, 91 L.Ed.2d 49 (1986) (declining to issue a definitive rule on employer liability).

[14] *Jones*, 793 F.2d at 720; *see also Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir.1981).

[15] *Jones*, 793 F.2d at 721 n. 7.

felt uncomfortable when touched by Henley. Perhaps most telling, Henley's hugs were often a subject of conversation, and an object of complaint, among the employees at the Center. Henley and the Center countered with three witnesses who did not find Henley's hugs offensive.

The district court concluded that "uncontroverted testimony" showed that Henley was a "demonstrable person" and that there was no evidence that he was an abuser or molester of women, no evidence that he sought sexual favors from Collins or others, and no evidence that he was lewd or suggestive to Collins. Collins did not contend otherwise. The basis of her claim was the evidence of Henley's hugs and physical contacts with other female employees.

The district court's finding is a mixed conclusion of law and fact, subject to the independent review of this court.[16] The district court's failure to confront the factual issues directly is troublesome. The jury was persuaded that sexual harassment did occur thus crediting Collins' witnesses. The Supreme Court has cautioned, however, that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII."[17] This was the weak link in Collins' hostile environment theory. Her evidence that conduct toward other female employees was sufficiently severe or pervasive to alter the psychological terms of her own working environment was far from compelling. Significantly, the jury was not persuaded that the

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[16] *See Pullman-Standard v. Swint*, 456 U.S. 273, 289 n. 19, 102 S.Ct. 1781, 1790 n. 19, 72 L.Ed.2d 66 (1982) (noting that the standard of review of mixed questions is an open issue); *Jordan v. Clark*, 847 F.2d 1368, 1375 n. 5 (9th Cir.1988) (stating that the district court's final conclusion, that the defendant's harassment did not alter a term of employment, was a mixed question subject to independent review).

[17] *Meritor Sav. Bank*, 477 U.S. at 67, 106 S.Ct. at 2405.

Center's failure to exercise ordinary care in investigating and stopping instances of discrimination and harassment was a proximate cause of injury to Collins. The district court adopted these findings. This was not error.

C. *The quid pro quo/disparate treatment claim.*

A prima facie case under the quid pro quo theory is essentially the same as under the hostile environment theory, except that the fourth element involves job benefits conditioned on the acceptance of the harassment. "The acceptance or rejection of the harassment by an employee must be an express or implied condition to the receipt of a job benefit or the cause of a tangible job detriment in order to create liability under this theory of sexual harassment."[18]

Collins attempted to prove at trial that female employees receptive to Henley received higher wages and more favorable treatment. Collins herself received one $0.20 raise and three $0.15 raises during her two years at the Center. This theory gained support from the testimony of former executive vice president Vic Rhoades. He testified that several female employees, not specifically identified, approached him while he was at the Center and expressed concern that their response to Henley's hugs and other physical contacts might affect their job. He suggested that Henley's secretary was "put into a position before [he] left that she was not qualified for" because of her relationship with Henley. He also testified that, in his opinion, several of the female employees receptive to Henley "got favorable treatment," a situation that he discussed with two members of the Board. On cross-

[18] *Jones*, 793 F.2d at 722 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 909 (11th Cir.1982)).

examination, however, he stated that he was not aware of any instance where an employee was terminated or adversely affected in salary because she indicated to Henley that she did not want him to hug her.

Several of the other witnesses testified that they noticed no changes in her duties after Henley's secretary was promoted from secretary to retirement administrator; they believed that the promotion was an example of special treatment. Not all could describe Butts' duties as retirement administrator, however. Myers and Collins also believed that the employees receptive to Henley received higher raises and extra vacation time. In an attempt to substantiate the quid pro quo, Collins' attorney led Collins' successor, Kay Wright, through an extensive comparison of the raises of various employees. On cross-examination, the defendants' attorney led her through a comparison of yearly salaries, pointing out that Collins' yearly salary was larger than those of most of the employees receptive to Henley.

The district court did not explicitly explain its evaluation of the evidence. Instead, it stated that Butts' salary was raised from $8.65 an hour to $10.82 an hour upon her promotion to retirement administrator and later to $12.02 an hour to bring her salary in line with other administrative heads. Additionally, the district court added that Butts' and Collins' positions involved different departmental levels and different responsibilities, implying that comparisons were inappropriate. Neither finding addresses Collins' suggestion that she would have received higher raises had she been more receptive to Henley. Certainly the testimony of Wright comparing raises, as opposed to yearly salaries, was at least relevant to the issue.[19]

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[19] The comparison of raises, when considered as a percentage of yearly income, was probably a better indicator of favoritism than the com-

The quid pro quo element of Collins' claim is subject to the independent review of this court. Unlike the retaliation claim, none of the state law claims parallel the quid pro quo claim. We therefore must remand the quid pro quo claim to the district court for further findings.[20] We imply no opinion on the merit of this factual controversy. That is for the district court. While it is understandable that this claim was not separately focused upon given the theories of recovery urged upon the bench and jury, we need further assistance.

IV.

We find no merit in Collins' remaining challenges to the factual findings of the district court. The district court found that "Mrs. Collins considers the fact that Mrs. Butts was paid more than she was paid to be an indication of salary discrimination at the Center." Collins points out that she also testified that other women receptive to Henley received preferences, but of course this does not make the finding cleary erroneous.

The district court described the letters received by the Board of Trustees as "anonymous." Collins contends that "the mistaken implication there is that anonymous means worthless," but we do not find such an implication in the finding.

Footnote 19 continued.

parison of yearly income. This court expresses no view on the comparison of raises at this time. Certainly the comparison of raises must be considered alongside other factors such as work performance.

[20] *See Lopez*, 807 F.2d at 434; *see also Smith v. Texas Dept. of Water Resources*, 799 F.2d 1026, 1031 (5th Cir.1986); *Sylvester v. Callon Energy Services, Inc.*, 724 F.2d 1210, 1216 (5th Cir.1984).

The district court stated that no one was present at the April 12 Board meeting to substantiate the accusations against Henley. Collins points out that Sanders, Denton, Merrill, Dorchester, and Allred were there, but this does not make the finding clearly erroneous because they had only second-hand knowledge of Henley's conduct toward female employees.

Finally, Collins challenges the district court's failure to order its finding under *Burdine* and *Jones*. The cases cited by Collins involved insufficient factual findings.[21] Any weakness in legal analysis by the district court in this case, by contrast, does not make appellate review impossible. Significantly, as we have observed, the shifting burdens outlined in *Burdine* were not relevant after the full trial on the merits.

V.

In sum, we affirm the denial of Collins' Title VII claim insofar as it relies upon theories of retaliation and hostile environment but remand upon the quid pro quo theory for further findings. The district court is not required to take additional evidence. The judgment of the district court is AFFIRMED in part and, in part, VACATED and REMANDED.

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[21] *See Rucker v. Higher Educational Aids Bd.*, 669 F.2d 1179, 1183-84 (5th Cir.1982); *Jefferies v. Harris City. Community Action Ass'n.*, 615 F.2d 1025, 1031 (5th Cir.1980).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-1396

FILED
Aug 29 1991

MARY A. COLLINS,
Plaintiff-Appellant,

versus

BAPTIST MEMORIALS GERIATRIC CENTER
and ODUS TAYLOR HENLEY,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Texas

ON PETITION FOR REHEARING

(August 29, 1991)

Before GOLDBERG, HIGGINBOTHAM and JONES,
Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby *denied*

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

ENTERED FOR THE COURT:

/s/ Patrick E. Higginbotham

United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

FILED
MAY 3 1990

MARY A. COLLINS	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
BAPTIST MEMORIALS GERIATRIC CENTER and ODUS TAYLOR HENLEY,	)	
	)	Civil Action No.
Defendants.	)	CA-6-89-002-C

ENTERED ON DOCKET
5-4-90 PURSUANT
TO F.R.C.P. RULES
58 AND 79a.

JUDGMENT

The above-styled and -numbered cause came on for trial. The parties announced ready. A jury was duly qualified and empaneled.

After hearing the testimony and argument of counsel, the jury retired to consider their verdict. Upon completion of their deliberations, the jury returned into open court their verdict, which was accepted by the Court

and ordered filed with the other papers of this cause. The verdict is referred to and incorporated herein as if set forth in full.

The Title VII claims of the Plaintiff were tried to the Court. The Court has this date entered an order making findings of fact and conclusions of law concerning such claims.

Based upon the jury verdict and for the reasons set forth in the Court's order making findings of fact and conclusions of law, the Court renders the following judgment:

IT IS ORDERED, ADJUDGED, AND DECREED that the Plaintiff, MARY A. COLLINS, do have and recover nothing as against Defendants, BAPTIST MEMORIALS GERIATRIC CENTER and ODUS TAYLOR HENLEY. All court costs are taxed against Plaintiff.

The Clerk shall furnish a copy hereof to each attorney of record.

Entered this 3rd day of May, 1990.

/s/ Sam R. Cummings

SAM R. CUMMINGS
United States District Judge

Certified a true copy of an instrument on file in my office on 6-8-90
NANCY HALL DOHERTY, Clerk,
U.S. District Court, Northern
District of Texas
By /s/A. Loyd, Deputy

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

FILED
MAY 3 1990

MARY A. COLLINS	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
BAPTIST MEMORIALS GERIATRIC CENTER and ODUS TAYLOR HENLEY,	)	
	)	Civil Action No.
Defendants.	)	CA-6-89-002-C

ENTERED ON DOCKET
5-4-90 PURSUANT
TO F.R.C.P. RULES
58 AND 79a.

ORDER

The above-captioned case came on for trial. State law causes of action were submitted to a jury for factual determinations. The Title VII claims were tried to the Court. After hearing the testimony, reviewing the exhibits admitted into evidence, and considering the argument of counsel, the Court makes the following findings of fact in reference to the Title VII claims of the Plaintiff:

1. The Court hereby adopts the findings made by the jury. Such answers to the jury questions are referred to and incorporated herein as if set forth in full.

2. At all times relevant to this lawsuit, Defendant ODUS TAYLOR HENLEY ("Henley"), was the Executive Director of Defendant BAPTIST MEMORIALS GERIATRIC CENTER ("the Center"). The Center is a Texas corporation with its business located in San Angelo, Tom Green County, Texas. Defendant Henley is the top officer of the Center. Plaintiff, MARY A. COLLINS ("Collins"), was hired as Personnel Director of the Center on February 17, 1986. Her employment with the Center was for no set term and was subject to termination without notice on the part of either Mrs. Collins or the Center. Mrs. Collins was terminated on March 21, 1988.

3. Prior to joining the Center, Mrs. Collins attended high school and subsequently obtained her G.E.D. She has no college degree. She has attended various management training seminars and court reporting schools. Mrs. Collins is 43 years old.

4. Mr. Henley is 72 years old. He has an undergraduate degree from Howard Payne University and a Divinity Degree from Southwest Baptist Seminary. He also received an honorary doctorate degree from Howard Payne. At age 24, he was one of the two youngest chaplains in the United States Army. In World War II, he was decorated with both the Bronze Star and Silver Star medals. Following World War II, he served as the minister at Immanuel Baptist Church for 12-½ years and then joined the Center in 1962, as the Director of Religious Activities and Public Relations. He became Executive Director of the Center in 1971.

5. In the last 28 years, the Center has grown into a multi-level retirement and medical care community for the care of retired and elderly persons beginning at 62 years of age. The Center is located on a 75-acre tract of land and features a retirement high-rise building, cottage and duplex units for a total of 315 living units. These units include 82 individual houses, 53 duplex units, 48 apartments in the high-rise building, plus 79 rooms and suites. The multi-level medical facilities include 315 beds which provide long-term care in the hospital, skilled nursing facility, and intermediate care facility. The Center has a total of 660 residents. It is inspeeted regularly by the Texas Department of Health and Human Services and has had its license for all units renewed each year following these inspections. The nursing home received a superior rating from the Department of Health in 1988, which is the highest rating possible in the State of Texas.

6. Mrs. Mary Butts is the 56-year-old Executive Secretary and Retirement Administrator at the Center. She was hired at the Center on September 7, 1982, as Executive Secretary to Mr. Henley and was promoted to Retirement Administrator on December 29, 1985, prior to the employment of Mrs. Collins at the Center. When Mrs. Butts was promoted to Retirement Administrator, her salary was increased initially from $8.65 an hour to $10.82 per hour. Subsequently, she was raised to $12.02 an hour on August 24, 1986, and then to $14.42 ($30,000 a year) on December 13, 1987, to bring her salary into line with the salaries paid to other administrative heads at the Center.

7. Mrs. Butts' position at the Center was on an administrative level and Mrs. Collins' job was on a departmental level with each job having different levels of responsibility. Mrs. Collins considers the fact that Mrs. Butts was paid more than she was paid to be an indication of salary

discrimination at the Center.

8. After going to work at the Center, Mrs. Collins worked closely with Mr. Vic Rhodes, the Executive Vice President of the Center. In the course of time, it was assumed that Mr. Rhodes (age 39) would replace Mr. Henley as the Center's Executive Director. However, Mr. Rhodes was terminated at the Center in 1987, and Mrs. Collins' and Mr. Henley's working relationship deteriorated thereafter.

9. Mrs. Collins received reprimands and warnings on February 15, 1988, and March 11, 1988, for approval of and request for unauthorized salary advances to employees over a period of time and for assuming authority which had been specifically forbidden and reserved only to the Executive Director who was on duty or the Executive Vice President. She received an additional reprimand for insubordination on March 21, 1988, for approving cash advances to employees without executive approval and was terminated.

10. Mrs. Collins first sought legal advice when Mr. Henley began giving her reprimands in early 1988. Prior to her termination, she also called the EEOC and was advised to document the things that were happening to her. Accordingly, Mrs. Collins prepared and filed various memos to her personnel file documenting her clashes with Mr. Henley at the Center. These memos are complaints by Mrs. Collins primarily concerning salary matters and perceived rudeness to her on the part of Mr. Henley. Mrs. Collins also documented her rebuttal to the reprimands that she received on February 15, 1988, and on March 14, 1988. She complained of her lack of authority in her position and that Mr. Henley always needed to blame someone. She complained that she was the scapegoat and she considered the

reprimands to be personal attacks on her. In none of the rebuttals are any claims made of sexual discrimination or misconduct on the part of Mr. Henley. However, Mrs. Collins did observe Mr. Henley to touch and hug various employees and patients at the Center and she considered these touchings to be offensive.

11. In late 1987 and early 1988, the Trustees of the Center began to receive numerous anonymous letters as well as telephone calls of complaint about Mr. Henley's administration of the Center as well as claims that Mr. Henley and Mrs. Butts were having an affair. There were also complaints that Mr. Henley was offensive in the way he hugged women at the Center.

12. Prior to her termination, Mrs. Collins approached a board member of the Center, Mr. Bill Denton, complaining of sexual harassment by Mr. Henley. Mr. Denton stated that the Board needed facts to work with from the people who had witnessed any improprieties and said that he could not go to the board with simply anonymous complaints. Thereafter, Mrs. Collins began gathering statements to turn over to Mr. Denton concerning various complaints. These complaints were unsigned and were delivered to Mr. Denton on March 21, 1988.

13. Mr. Denton delivered these unsigned complaints against Mr. Henley to Frank Sanders, the Chairman of the Board of Trustees of the Center, on March 21, 1988. At no time did Mr. Denton tell Mr. Sanders nor Mr. Henley the name of the person who had delivered the complaints to him. That same afternoon of March 21, 1988, however, Mrs. Collins was terminated by Mr. Henley for insubordination.

14. Mr. Sanders first learned that Mrs. Collins had

provided the various complaints to Bill Denton after her termination. He met with Mrs. Collins and Bill Denton on April 5, 1988, at his office. He was told at that time by Mrs. Collins that there were people who were willing to come forward and tell the Board their complaints contained in their various unsigned letters. She also informed Mr. Sanders that she had retained an attorney to represent her.

15. A meeting of the Executive Committee of the Board of Trustees was called by Mr. Sanders for April 12, 1988, at 1:30 p.m. to deal with the anonymous allegations that the Board had been receiving, both over the phones and through the mail. Mrs. Collins was given the opportunity to appear and bring anyone who wanted to voice a complaint against Mr. Henley or the Center and to speak to the Board members. Mrs. Collins was informed on April 5, 1988, that Mr. Henley would also have the right to be present.

16. On April 12, 1988, the called meeting of the Executive Committee of the Board of Trustees was held to discuss the many anonymous letters and telephone calls regarding the character and capability of the Executive Director, Mr. Taylor Henley. However, Mrs. Collins and any witnesses who had any complaint failed to appear. As a result, there was no one to substantiate the accusations.

17. Following Mrs. Collins' termination, she was unemployed from March 21, 1988, until August 15, 1988. She has been employed from August 15, 1988, to the present as Assistant to the Academic Coordinator of Concho Career Institute, Inc. in San Angelo at a salary of $1,000 a month. Prior to gaining her present employment, Mrs. Collins applied for work at a law firm in San Angelo, as well as the U. S. Post Office, the Census Bureau, Dillard's, Penney's, Skaggs Alpha Beta, and the Texas Parks and Wild-

life Department. During this same period of time, others were also searching for jobs in the local economy due to the depression in the West Texas oil business. No one has ever told Mrs. Collins specifically that Mr. Henley has ever said anything slanderous about her since her termination at the Center.

18. The uncontroverted testimony, including that given by the Plaintiff, shows that Taylor Henley was a demonstrable person. He hugged patients and residents at the Center as well as some of the employees. There is no evidence to show that Henley was a molester or abuser of women. No evidence was elicited which showed Henley seeking sexual favors from Plaintiff or anyone else. Henley was not lewd or suggestive towards the Plaintiff. Mrs. Collins never complained to Taylor Henley about his hugging either the Plaintiff or others. The Plaintiff never heard others complaining to Mr. Henley about his hugging. The Plaintiff never heard Henley hugging anyone who did not want to be hugged. To a great extent, the Plaintiff considers all touching to be offensive; she realizes, however, that many women do not share her attitude. The Plaintiff's problems with Mr. Henley did not start until December of 1987. Up to that point, Mr. Henley gave Mrs. Collins good job evaluations.

Based upon the above findings, the Court makes the following conclusions of law in reference to the Plaintiff's Title VII claims:

1. The Plaintiff has not proven a case of sexual harassment against either Defendant BAPTIST MEMORIALS GERIATRIC CENTER or Defendant ODUS TAYLOR HENLEY.

2. The evidence does not support a recovery under

Title VII on a "quid pro quo" theory, a hostile or offensive working environment theory, a retaliation theory, or disparate treatment theory.

3. The answers of the jury to Questions Nos. 1 and 3 support the Court's finding and conclusion concerning any retaliation theory.

4. The jury answer to Question No. 6 supports the Court's finding and conclusion that Mrs. Collins has sustained no damage or detrimental effect by virtue of any claimed sexual harassment.

As a result, in reference to the Title VII claim, judgment shall be entered for the Defendants in accordance with the above findings of fact and conclusions of law. Costs of court are taxed against Plainfiff.

IT IS SO ORDERED.

The Clerk shall furnish a copy hereof to each attorney of record.

Entered this 3rd day of May, 1990.

/s/ Sam R. Cummings

SAM R. CUMMINGS
United States District Judge

Certified a true copy of an instrument on file in my office on 6-8-90
NANCY HALL DOHERTY, Clerk,
U.S. District Court, Northern
District of Texas
By /s/ A. Loyd Deputy

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

FILED
APR 3 1990

MARY A. COLLINS	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
BAPTIST MEMORIALS GERIATRIC CENTER and ODUS TAYLOR HENLEY,	)	
	)	Civil Action No.
Defendants.	)	CA-6-89-002-C

COURT'S CHARGE TO THE JURY

MEMBERS OF THE JURY:

Now that you have heard all of the evidence, it becomes my duty to give you the instructions of the Court concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the Court, just as it would also be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in the case.

In deciding the facts of this case, you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as is a private individual. The law is no respecter of persons, and all persons, including corporations, stand equal before the law and are to be dealt with as equals in a court of justice.

When a corporation is involved, of course, it may act only through natural persons as its agents or employees; and, in general, any agent or employee of a corporation may bind the corporation by his acts and declarations made while acting within the scope of his authority delegated to him by the corporation, or within the scope of his duties as an employee of the corporation.

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence

I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice.

In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

Generally speaking, there are two types of evidence which a jury may consider in properly finding the truth as to the facts in this case. One is direct evidence — such as testimony of an eyewitness. The other is indirect or circumstantial evidence — the proof of a chain of circumstances which points to the existence or nonexistence of certain facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts from a preponderance of all the evidence, both direct and circumstantial.

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to his testimony. In weighing the testimony of a witness, you should consider his relationship to the plaintiff or to the defendant; his interest, if any, in the outcome of the case; his manner of testifying; his opportunity to observe or acquire knowledge concerning the facts about which he testified; his candor, fairness and intelligence; and the extent to which he has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

During the trial of this case, certain testimony has been read to you by way of depositions, consisting of sworn, written answers to questions asked of the witness in advance of trial by one or more of the attorneys for the parties to the case. The testimony of a witness who, for some reason, cannot be present to testify from the witness stand, is usually presented in writing under oath, in the form of a deposition. Such testimony is entitled to the same consideration and is to be judged as to credibility, and weighed, and otherwise considered by the jury in the same way, insofar as possible, as if the witness had been present and had given from the witness stand the same testimony as given in the deposition.

The rules of evidence provide that if scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify and state his opinion concerning such matters.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely.

The burden is on the plaintiff in a civil action such as this to prove every essential element of his claim by a "preponderance of the evidence." A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a "preponderance of the evidence" merely means to prove that the claim is more likely so than not so.

In determining whether any fact in issue has been proved by a preponderance of the evidence, the jury may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have introduced them. If the proof should fail to establish any essential element of plaintiff's claim by a preponderance of the evidence, the jury should find for the defendant as to that claim.

A witness may be "impeached" or discredited by contradictory evidence, by a showing that he or she testified falsely concerning a material matter, or by evidence that at some other time he or she said or did something, or failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached, it is in your exclusive province to give the testimony of that witness such credibility or weight, if any, as you think it deserves.

In answering the questions which I will submit to you, answer "yes" or "no" unless otherwise instructed. A "yes" answer must be based on a preponderance of the evidence. If you do not find that a preponderance of the evidence supports a "yes" answer, then answer "no."

After I have completed reading this Charge to you and have reviewed the verdict form, instructions, and jury questions, counsel will have the opportunity to make their closing arguments.

Your verdict must represent a considered judgment of each juror. In order to return a verdict, it is necessary that all members of the jury agree thereto. You may not therefore enter into an agreement to be bound by a majority or any vote other than a unanimous one.

Remember at all times you are not partisans. You are judges — judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Upon retiring to the jury room, you should first select one of your number to act as your presiding officer who will preside over your deliberations and will be your

spokesman here in Court. A verdict form has been prepared for your convenience. Your presiding officer will sign in the space provided below after you have reached your verdict.

If, during your deliberations, you wish to communicate with the Court, you should do so only in writing by a note handed to the Deputy Marshal and signed by the presiding officer. During your deliberations, you will set you own work schedule, deciding for yourselves when and how frequently you wish to recess and for how long.

After you have reached your verdict, you will return this charge together with your written answers to the questions that I will submit to you. Do not reveal your answers until such time as you are discharged, unless otherwise directed by me.

Date: April 13, 1990

/s/ Sam R. Cummings

SAM R. CUMMINGS
United States District Judge

Fraud occurs when one makes a misrepresentation of a material fact to another and the other relies upon it to his detriment. In order to establish her claim against the Defendants for damages based upon fraud by Defendants, Plaintiff must prove by a preponderance of the evidence the following elements:

(1) that Defendants made a material representation;

(2) that it was false;

(3) that when Defendants made it, they knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion;

(4) that Defendants made it with the intention that it should be acted upon by Plaintiff;

(5) that the Plaintiff acted in reliance upon it; and

(6) that she thereby suffered injury.

If you find that Plaintiff has established each of these elements by a preponderance of the evidence, then you must return a verdict in her favor. If, on the other hand, you find that she has failed to so establish any one or more of these elements, then you should find for Defendants.

Plaintiff contends that Defendants engaged in a series of actions which constituted an intentional infliction of emotional distress. In order to establish her claim against Defendants for damages based upon the theory of intentional infliction of emotional distress, Plaintiff must prove by a preponderance of the evidence the following elements:

(1) the Defendants acted intentionally or recklessly;

(2) the conduct was "extreme and outrageous";

(3) Defendants' actions caused the Plaintiff emotional distress; and

(4) the emotional distress suffered by Plaintiff was severe.

If you find that Plaintiff has established each of these elements by a preponderance of the evidence, then you must return a verdict in her favor. If, on the other hand, you find that she has failed to so establish any one or more of these elements, then you should find for Defendants.

Slander is a verbal defamation, and libel is a written defamation. The statements do not have to name Plaintiff if it can be reasonably inferred that the statement was referring to her. In order to establish her claim against Defendants for damages based upon slander or libel, Plaintiff must prove by a preponderance of the evidence the following elements:

(1)that Defendants made verbal or written statements concerning Plaintiff;

(2) that the statements were made to third persons;

(3) (a) that the statements tended to injure the reputation of Plaintiff and thus expose her to public hatred, contempt, ridicule or financial injury, or impeach her honesty, integrity, virtue or reputation, or

(b) that the statements injure Plaintiff in her office, business, profession, or occupation.

(4) that the statements were actuated, inspired or colored by actual or express malice, existing as a fact at the time of the publication, or by some evil motive or bad faith.

The burden of proof is on the plaintiff to show actual malice. Actual malice is shown when Defendants acted with knowledge that a statement was false or with reckless disregard of whether it was false or not.

Truth is a defense. The burden is on Defendants to establish the truth of the statements.

If you find that Plaintiff has established each of these elements by a preponderance of the evidence and Defendants have failed to establish the statements were true, then you must return a verdict in her favor. If, on the other hand, you find that she has failed to so establish any one or more of these elements or that Defendants have established the statements were true, then you should find for Defendants.

Plaintiff contends that Defendants breached a portion of Article 4442c which is a state statute that relates to convalescent and nursing homes and related institutions. The portion of Article 4442c that Plaintiff contends defendants violated essentially prevents an employer from terminating an employee for reporting the abuse or neglect of a nursing home's patients to the person's supervisors. In order to establish her claim against Defendants for damages based upon such a breach by Defendants, Plaintiff must prove by a preponderance of the evidence the following elements:

(1) that Plaintiff reported the abuse or neglect of nursing home patients to Plaintiff's supervisors; and

(2) that Defendants terminated the employment of Plaintiff as a result of the reporting of the abuse or neglect of nursing home patients to Plaintiff's supervisors.

If you find that Plaintiff has established each of these elements by a preponderance of the evidence, then you must return a verdict in her favor. If, on the other hand, you find that she has failed to so establish any one or more of these elements, then you should find for Defendants.

Plaintiff brings a claim against the Center for failing to exercise ordinary care in investigating and stopping alleged instances of sexual discrimination and harassment. In order to establish her claim against Defendant Center for damages caused based upon such a failure by the Center, Plaintiff must prove by a preponderance of the evidence the following elements:

(1) that Defendant Henley was harassing female employees at the Center and discriminating against them because of their sex;

(2) that the Board of Trustees knew or should have known of the sexual harassment and discrimination; and

(3) that the Board of Trustees failed to exercise ordinary care by failing to investigate and stop the instances of sexual harassment and discrimination, that is, that a person of ordinary prudence under the same or similar circumstances would have investigated and halted the alleged sexual discrimination and harassment.

If you find that Plaintiff has established each of these elements by a preponderance of the evidence, then you must return a verdict in her favor. If, on the other hand, you find that she has failed to so establish any one or more of these elements, then you should find for Defendants.

Plaintiff contends that the Center terminated her employment not for justifiable reasons but for improper reasons, that is, for reasons relating to her reporting acts of sexual harassment and discrimination or in refusing to ignore these actions as Personnel Director. In order to establish her claim against Defendants for damages based upon her claim of wrongful termination, Plaintiff must prove by a preponderance of the evidence the following elements:

(1) that Defendants terminated her employment at the Center; and

(2) that the basis for Defendants' termination of her employment was related to her reporting acts of sexual harassment and discrimination or in refusing to ignore such activity in her capacity as Personnel Director.

If you find that Plaintiff has established each of these elements by a preponderance of the evidence, then you should return a verdict in her favor. If, on the other hand, you find that she has failed to so establish any one or more of these elements, then you should find for Defendants.

"Proximate cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred; and in order to be a proximate cause, the act or omission

complained of must be such that the person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

"Negligence" means failure to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.

"Ordinary care" means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.

"Mental anguish" or "emotional distress" means more than mere worry, anxiety, vexation, embarrassment or anger. The term "mental anguish" or "emotional distress" implies a high degree of mental pain and distress including a mental sensation of pain resulting from grief, severe disappointment, indignation, wounded pride, shame, despair or public humiliation.

You are further instructed that Question 17 asks whether exemplary damages should be assessed against Defendants. In deciding whether to assess exemplary damages against Defendants, you are hereby instructed that exemplary damages are not allowed as a matter of right or as compensation. Exemplary damages serves the public interest of punishment to wrongdoers and deterrence to others from similar conduct in the future. In order to assess punitive damges, you must find that Defendants acted willfully, knowingly, deliberately or designedly in the prepetration of the wrongful acts. You are further instructed that exemplary damages may be assessed where there had been reckless disregard of the rights of another.

An act is done recklessly if it involves acts of bad faith, conscious indifference, malice or wanton disregard for the rights of others.

If you conclude from a preponderance of the evidence that Defendants have engaged in the alleged wrongful actions willfully, knowingly, deliberately, with malice, ill will, intent to harm, or with reckless disregard of the rights of Plaintiff, then you should assess exemplary damages against Defendants. If, on the other hand, you conclude that Plaintiff has failed to show the requisite intent by a preponderance of the evidence, then you should refrain from assessing exemplary damages.

QUESTION NO. 1

Was Mary Collins wrongfully terminated by the Center for reporting acts of harrassment and discrimination?

Answer "Yes" or "No."

Answer: No

If you have answered "Yes" to Question No. 1, then answer the following question; otherwise, do not answer the following question.

QUESTION NO. 2

Was the wrongful termination of Mary Collins by the Center the proximate cause of damages to Mary Collins?

Answer "Yes" or "No."

Answer: _____

QUESTION NO. 3

Was Mary Collins wrongfully terminated by the Center for refusing to ignore sexual harrassment and discrimination?

Answer "Yes" or "No."

Answer: **No**

If you have answered "Yes" to question No. 3, then answer the following question; otherwise, do not answer the following question.

QUESTION NO. 4

Was the wrongful termination of Mary Collins by the Center the proximate cause of damages to Mary Collins?

Answer "Yes" or "No."

Answer: _____

QUESTION NO. 5

Did the Center fail to exercise ordinary care in investigating and stopping alleged instances of sexual discrimination and harassment?

Answer "Yes" or "No."

Answer **Yes**

If you have answered "Yes" to Question 5, then answer the following question; otherwise, do not answer the following question.

QUESTION NO. 6

Was the Center's failure to exercise such ordinary care the proximate cause of damages to Mary Collins?

Answer "Yes" or "No."

Answer: **No**

QUESTION NO. 7

Was Mary Collins' report of abuse or neglect of residents at Baptist Memorials Geriatrics Center the reason or one of the reasons that the Center or Henley terminated Mary Collins' employment?

Answer "Yes" or "No" for each Defendant.

Center **No**

Henley **No**

QUESTION NO. 8

Did Defendants defraud Mary Collins in the representation that the Center did not allow or condone sexual discrimination and harassment?

Answer "Yes" or "No" for each Defendant.

Center **No**

Henley **No**

QUESTION NO. 9

Did the Center defraud Mary Collins by representing that if she submitted statements concerning improprieties by Defendant Henley that she would not be fired for doing so?

Answer "Yes" or "No."

Answer: **No**

If you have answered "Yes" to either part of Question 8 or to Question 9, then answer the following question; otherwise, do not answer the following question.

QUESTION NO. 10

Was Defendants' fraud the proximate cause of damages to Mary Collins?

Answer "Yes" or "No."

Answer: _____

QUESTION NO. 11

Did Defendants slander or libel Mary Collins?

Answer "Yes" or "No" for each Defendant.

Center **No**

Henley **No**

If you have answered "Yes" to either part of Question 11, then answer the following question; otherwise, do not answer the following question.

QUESTION NO. 12

Was Defendants' slander or libel of Mary Collins the proximate cause of damages to Mary Collins?

Answer "Yes" or "No."

Answer: _____

QUESTION NO. 13

Did Defendants intentionally inflict emotional distress on Mary Collins?

Answer "Yes" or "No" for each Defendant.

Answer:

Center **No**

Henley **No**

If you have answered "Yes" to either part of Question 13, then answer the following question; otherwise, do not answer the following question.

QUESTION NO. 14

Was Defendants' intentional infliction of emotional distress on Mary Collins the proximate cause of damages to Mary Collins?

Answer "Yes" or "No."

Answer: _____

If you have answered "Yes" to either Question No. 2, 4, 6, 7, 10, 12, or 14, then answer the following question; otherwise, do not answer the following question.

QUESTION NO. 15

What amount of money, if paid now in cash, would fairly and reasonably compensate Mary Collins for the injury or damage, if any, she has sustained as a proximate result of the actions of Defendants?

Consider the elements of damages listed below and none other. Consider each element separately. Do not include damages for one element in any other element. Do not include interest on any amount of damages you find.

Answer in dollars and cents for damages, if any, as to each of the following elements:

A. Loss of past wages, if any, sustained by Mary Collins

Answer: _____

B. Loss of future wages, if any, reasonably expected to be sustained by Mary Collins

Answer: _____

C. Damages for injury to the reputation of Mary Collins

Answer: _____

D. Mental anguish and emotional distress, if any, suffered by Mary Collins

Answer: _____

If you have answered "Yes" to either Question No. 2, 4, 6, 7, 10, 12, or14, then answer the following question; otherwise, do not answer the following question.

QUESTION NO. 16

Were any of Defendants' wrongful actions done knowingly, deliberately, with malice, or with reckless disregard to the rights of Mary Collins?

Answer "Yes" or "No" for each Defendant.

Answer:

Center _____

Henley _____

If you have answered Question 16, "yes," as to either Defendant then answer the following question as to such Defendant; otherwise, do not answer Question 17.

QUESTION 17

What sum of money, if any, should be awarded to Mary Collins against Defendants as exemplary damages?

"Exemplary damages" means an amount that you may in your discretion award as an example to others and as a penalty or by way of punishment, in addition to any amount that you may have found as actual damages.

Answer in dollars and cents, if any.

Answer:

Center _____

Henley _____

CERTIFICATE

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

/s/ Illegible

Presiding Officer of the Jury

APPENDIX F

March 12, 1988

To Whom It May Concern,

During the term of my employment at Baptist Memorial Center I felt I was sexually harassed by Taylor Henley. Unfortunately I am not alone in this affair. Many other female staff members have been imposed upon also.

The problem is in the manner in which Mr. Henley greets certain female staff members. Mr. Henley has a habit of placing his arm around the shoulder with the hand either resting on the side of the breast or at the top of it and then pulling the female closer to him. He appeared to be selective as to the staff position as to whom he would embrace in this manner. I personally felt trapped when these encounters took place and unable to prevent the situation from occuring.

One staff member thought being a new employee that by wearing a long line bra she could deter or discourage this unwelcome behavior.

My husband and I have been married for a very long time and I am not in any extramaritial experiences. Never in any personal or business relationship have I encouraged this type of familiarity from a male. You may consider my complaint petty but I assure you if your wife had to put up with a feeling of being molested everyday at work you perhaps would think twice.

Thank You,

CASE NO. CA6-89-0002-C
Collins
VS. Baptist Memorials
Plaintiff's Exhibit 1

March 15, 1988

TO WHOM IT MAY CONCERN:

1987 — I went to Mr. Henley's office to talk to him about a problem. No one was sitting out at the front desk where Mrs. Butts sits so I went on back into Mr. Henley's office.

When I walked into the doorway of Mr. Henley's office, I notice Mr. Henley and Mary Butts over to the right. Mr. Henley had her pulled up in his arms, his arms around her and she was looking up at him. They had been hugging each other. His hands were on her behind.

I was very embarrassed, said "Excuse me," and walked out as fast as possible. I did not know what to do about this. I am very uncomfortable about this and I worry about my losing my job all the time because of this incident.

/s/Clyde S. Sanchez

Clyde S. Sanchez
Director of Housekeeping

CASE NO. CA6-89-0002-C
Mary Collins
VS. Baptist Memorials
Plaintiff's Exhibit 2

I went to Mr. Henley's office to ask for my check early, there was no one sitting at the front desk, I heard his voice in his office and his door was half open, so I knocked twice and walked in. Mrs. Butts was standing facing the book shelf, Mr. Henley was standing behind her with both of his hands on her butt. I said excuse me and started to walk out. Then he said in an angry voice, "what do you want." So I told him, he said "OK" and rushed me out and shut the door behind me.

CASE NO. CA6-89-0002-C
Mary Collins
VS. Baptist Memorials
Plaintiff's Exhibit 3

TO: BOARD OF TRUSTEES -
BAPTIST MEMORIALS CENTER

ON SEVERAL OCCASIONS I HAVE SEEN MR. HENLEY GIVING THE NURSES HUGS AND SQUEEZING THEM.

WHEN I FIRST CAME TO WORK AT BMGC, HE WOULD ALWAYS TRY TO GRAB ME OR RUB MY SHOULDERS. THIS MADE ME VERY UNCOMFORTABLE. I ALWAYS TRIED TO AVOID HIM WHEN POSSIBLE. IT WAS A JOKE AMONG THE WOMEN EMPLOYEES.

/s/ Mary Ann Flores

CASE NO. CA6-89-0002-C
Mary Collins
VS. Baptist Memorials
PLAINTIFF'S EXHIBIT 4

BOARD OF TRUSTEES

TO WHOM IT MAY CONCERN:

One day while out at BMC I had been taking care of the watering of plants on the patio. I had noticed that water was running down the streets and decided to see if Mr. Henley knew that the yard employees were not taking care of this and allowing the water to be wasted.

I went walking into Mr. Henley's office and he was sitting on the corner of his desk with Mary Butts leaning up towards him. She was standing between his legs up against him. He looked up when he saw me and studdered (sic) and stammered and said "What do you want ____?" I told him that I just wanted him to know about the water and turned and left as quickly as I could.

Ruth Bateman

CASE NO. CA6-89-0002-C
Mary Collins
VS. Baptist Memorials
PLAINTIFF'S EXHIBIT 5

March 18, 1988

TO WHOM IT MAY CONCERN:

When I first was employed at BMC, Mr. Henley always had to come into the office to hug and squeeze me and try to stand as close to me as possible. I soon learned to keep the desk or a good distance between us. I think he soon got my message.

I have personally been in the office when Mr. Henley came through and went around behind a lady and stood there and rubbed her back and shoulders. He snapped her bra while standing there. When he left, this employee took a deep gasp and asked if we heard that? A few weeks later Mr. Henley was in our office again. He was standing behind a female employee rubbing her back. When he left the employee told us that she knew Mr. Henley was surprised because he could not find a bra strap to snap.

I walked in on another incident one day where he had a female employee cornered. She was bent over and he had his hands where they should not have been. I was very embarrassed and turned around and walked out. I walked back to another office and waited to see how long they would stay back there. I timed them — exactly 12 minutes. Mr. Henley came down the hall and saw that I was still there and was quite upset to see me still there. So was the female employee.

I walked in on him and a female employee (different woman) down in Medical Records one day, also. He had her all pulled up with his arms around her. He was bent down in her face. He straightened up and gave me a hard look. I stood in the doorway and did not leave on purpose. He released her and walked out.

I have had numerous employees come to me about this problem. Because of being employed at BMC, they are afraid for their jobs. For some reason they feel I should be able to stop these sort of incidents. It should not be permitted to happen.

/s/ *Mary Collins*
Personnel Director

CASE NO. CA6-89-0002-C
Mary Collins
VS. Baptist Memorials
PLAINTIFF'S EXHIBIT 6

March 16, 1988

I worked for Mr. Henley for five months. He never bothered me since I made it clear that I did not approve of the patting and feeling. I witnessed a lot of it with all of the women.

On one occasion, he had me go down to Div. 6 with him to a little old ladies room. He had a deed prepared for her to sign. She was very ill. I cannot remember her name but I am sure if you checked with Medical Records you could find out her name. She did not want to sign the deed until her son came later that afternoon. He badgered and demanded that she sign it right then. She pleaded and cried and told him that she did not want to sign it until her son arrived. He kept on and on at her until she finally signed the will. I had never seen anything like that done before and was very upset over it. She passed away soon after that and he confiscated everything she had.

I am a Christian and could not abide with such behavior. I soon resigned and found work elsewhere. I have seen what sort of a person Mr. Henley is. I am sure if you checked the Court House you would be surprised at the number of wills that are a matter of public record which are naming him, personally, as beneficiary.

Margaret A. Litton

CASE NO. CA6-89-0002C
Mary Collins
VS. Baptist Memorials
PLAINTIFF'S EXHIBIT 7

APPENDIX G

February 8, 1988

Dr. Jerold McBride
3225 Alta Vista Drive
San Angelo, Texas 76904

Dear Dr. McBride:

Enclosed is a copy of a letter mailed out today to each member of the Board of Trustees of Baptist Memorials Center. It hurts me very deeply to know that you, as a man of God and Chairman of the Human Welfare Coordinating Board, would condone the activities of Taylor Henley, both in regard to Baptist Memorials Center as a whole and in his personal relationship with Mary Butts.

As a leader of the Church, you were informed about what was going on there and have chosen to look the other way. I, as well as many, many others, have lost a great deal of respect for you and wonder now who we are to turn to in the future with our problems. Your failure to act on the information you received has placed you in a position of responsibility for Taylor Henley's actions and for any negative publicity that is sure to come from this situation. The residents of the Village and High Rise, patients in the Hospital and Nursing Home and employees of Baptist Memorials Center have prayed and endured long enough. This is indeed a dark hour for all Baptists and others who have put their trust in Taylor Henley. Hopefully, prayer

will help you through this time and lead you to do what is right.

Sincerely,

A Dream of God

CASE NO. CA6-89-0002-C
Mary Collins
VS. Baptist Memorials
PLAINTIFF'S EXHIBIT 22

February 8, 1988

Mrs. Evelyn Linebery
Box 1536
Midland, Texas 79701

Dear Mrs. Linebery:

Enclosed is a copy of a letter that went out today to Dr. Jerold McBride as well as a copy of a letter that went to each member of the Board of Trustees of Baptist Memorials Center.

Because you have played such an important role in the development of Baptist Memorials Center over the years and because you are such a caring and gracious lady, it was only fitting that the situation at Baptist Memorials Center be handled quietly, before a scandal was enevitable. (sic) However, such no longer seems possible because no one seems to want to get involved. But all of us are involved and the few of us are now many and the situation at Baptist Memorials Center has reached an intolerable level.

We appologize to you for what the future might bring but as Christians, we cannot allow the behavior of Taylor Henley and his personal relationship with Mary Butts to destroy the good that has been done at Baptist Memorials Center.

Sincerely in Christ,

CASE NO. CA6-89-0002-C
Mary Collins
VS. Baptist Memorials
PLAINTIFF'S EXHIBIT 23

March 26, 1988

William M. Pinson Jr.
Executive Director
Baptist General Convention of Texas
511 North Akard
Dallas, Texas 75201

Dear Mr. Pinson:

Enclosed are copies of the letters that went out to the Board of Trustees of Baptist Memorials Geriatric Center in San Angelo on February 8, 1988 and March 26, 1988, as well as a copy of the letter that went to Dr. Jerold McBride, Chairman of the Human Welfare Coordinating Board. We are asking for your help as Executive Director of the Baptist General Convention of Texas to help us in our hour of need. We don't believe that the Board of Trustees will take any action on our problems or on Taylor Henley's immoral behaviour and this situation will not be tolerated any longer by the people who live and work at Baptist Memorials.

We fear that if Taylor Henley and various Board members find out specifically who the people are that are trying to change this situation, that the employees will be fired and the residents of the Village and High Rise will be made to pay for trying to stand up for themselves. We do not want for this situation to become a public scandal, but we will be heard and we do expect action to be taken. Please try to help us; ask some questions; send in outsiders to investigate; anything that will give Baptist Memorials a chance to survive.

Again, I cannot sign my name to this letter as I am really not absolutely sure that you can be trusted either. I have found that Board members as well as Dr. McBride have chosen to look the other way and have been proven to be most untrustworthy. We pray that God will direct you.

CASE NO. CA6-89-0002-C
Mary Collins
VS. Baptist Memorials
PLAINTIFF'S EXHIBIT 24

CASE NO. CA6-89-0002-C
Mary Collins
VS. Baptist Memorials
PLAINTIFF'S EXHIBIT 25

February 8, 1988

Board of Trustees
Baptist Memorials Geriatric Center
902 N. Main
San Angelo, Texas 76903

Dear Board Member:

Another Board Meeting has come and gone and you, as a member of the Board of Trustees of Baptist Memorials Center have again chosen to ignore a potentially disasterous situation that exists at a place you are supposed to care about. For over a year now, different members of the Board have been contacted regarding problems in three separate areas at Baptist Memorials Center and it is time that every member of the Board be made aware of these problems. They need to be dealt with now, before they cause a black eye for all Trustees and all who call ourselves Baptist Christians. I do not understand why we have to wait until an outcry becomes public or until a scandal is inevitable before we choose to act. You, as a member of the Board of Trustees are responsible for the institution, its patients, Villagers and High Rise residents and the employees who work so hard to make our Ministry a reality. I write this letter unsigned as I fear reprisals from Taylor Henley and possible from some of you as the Board of Trustees, but my God tells me that these things need to be brought out in the open if we are to accomplish the goals of our ministry. Please try to read this letter with an open mind; it's time someone took the problems seriously. They are not going to go away.

First, to my knowledge, the employees of Baptist Memorials Center are on the average some of the lowest paid in San Angelo. The majority can look forward to a 5¢ an hour per year increase which doesn't even keep up with the cost of living. This 5¢ was guaranteed by a Wage and Salary Program that was adopted by the Board of Trustees two years ago. Since that time, Taylor Henley has opted to do away with it because it restricted him to giving raises fairly, based upon performance. The situation was worsened by Taylor Henley's decisions to pass out *everyone's* raises to just a few people that *he* deemed worthy. In the meantime, employees come and go and have no financial security to look forward to. The Board should take some responsibility in assuring that the employees can at least rise above the poverty level and that they are treated fairly. How can it be expected that quality care be given when so many people never stay long enough to be properly trained? This situation not only effects the employees who work for Baptist Memorials Center, but it effects every patient that depends on them for care. I probably wouldn't know any of this if there weren't so many unhappy people at Baptist Memorials Center.

The patients within the Hospital and Nursing Home as well as residents in the Village and High Rise are virtually at the mercy of one man, Taylor Henley. New furniture and equipment is needed for the hospital, but there never seems to be any money for such things. Taylor Henley seems to be oblivious to the fact that patients as well as their families are depending on Baptist Memorials Center to care for their loved ones. It just doesn't seem to matter to him. The residents in the High Rise and Village are intimidated and bullied by Taylor Henley's dictator type attitude. These people are not children and his answer of "Because *I* said so" doesn't seem to be an appropriate answer when people are looking to Taylor Henley for answers. So many

residents with the exception of Taylor Henley's chosen few, feel trapped in this place instead of enjoying their senior years in comfort and peace. A true Retirement Administrator is needed to organize activities and genuinely care about the people who have committed to spend the rest of their lives here. Unless one is a member of the Glory Choir or will opt to pay for Taylor Henley's vacations each year, there are not a lot of options. It is too late for most of the residents to start their retirement over somewhere else and all they have to look forward to is becoming a patient in the Hospital, a prospect that is most frightening.

Lastly, if you do not think the employees or patients or residents of Baptist Memorials Center are worth taking care of, I hope you think that the *reputation* of Baptist Memorials *is* worth saving. Taylor Henley is paying his secretary, Mary Butts, $14.12 per hour to type for him and to be a party to his immoral, extra marital affair. Their behavior has been witnessed by both employees and residents who have walked in on the two of them in very compromising positions where there was no doubt as to what was going on. Members of the Board know about this as well as Taylor Henley's off-color remarks and base actions towards other females he comes in contact with. Yet because it has not reached PTL scandal proportions, you have opted to ignore what has already been substantiated. These are not just rumors or inuendo.(sic) You have the option of letting Taylor Henley and Mary Butts resign gracefully and quietly now before this affair becomes public. There are a lot of people who are outraged by your apparent acceptance of this situation and his treatment of those who live and work at Baptist Memorials. Taylor Henley has made a mockery of your Ministry and has left Baptist Memorials as well as the Board of Trustees open for multiple lawsuits on many grounds.

It's time you all took responsibility for the problems at Baptist Memorials and started your own investigation if you have doubts that these allegations are true. By sitting back and doing nothing, you are condoning Taylor Henley's immoral behavior and are as guilty as he is. The time to act is now before Baptist Memorials becomes a public embarrassment. I do not feel comfortable going to my pastor about this because I know that Dr. McBride has been informed of the problems and has chosen to look the other way also. How can we as Christians expect to minister to those in need when all of our efforts are tainted by one man?

My conscience is clear, I can look myself in the mirror and I can sleep at night because I have prayed for many months about this and I have done all I can to give you a chance to do what's right.

CASE NO. CA-89-0002-C
Mary Collins
VS. Baptist Memorials
PLAINTIFF'S EXHIBIT 26

March 26, 1988

Board of Trustees
Baptist Memorials Geriatric Center
902 N. Main
San Angelo, Texas 76903

Dear Board Member:

It has been nearly six weeks since you were apprised of a potentially disasterous and embarrassing situation that exists at Baptist Memorials Center in San Angelo. As of this time, I, as well as a large group of others, can see no action being taken on the part of the Board to rectify the situation.

We were asked to write about our problems and things that we've seen in regards to Taylor Henley and were told that we would probably be contacted by the Board to verify what we have written. Although we are all afraid of reprisals, we agreed because the situation has gone on much too long. Our statements were passed on to Mr. Frank Sanders, Chairman of the Board of Trustees, and it was also our understanding that he would send copies of our statements to all of the Board members so that you would all know the extent of the problems. As of this time, none of us have heard from any Board members. We don't understand why it is so difficult for the Board to stand up to Taylor Henley or to ask questions of people who live or work at Baptist Memorials to verify what is happening. We do not understand how you can sit back and

allow one man to destroy what so many have worked so hard to build. Do you have any idea what a public scandal could do to Baptist Memorials? The very fact that Jim Bakker, Jimmy Swaggart and Walker Railey, in their public positions could be guilty of sexual misconduct and intimidation should be enough to make you realize that Taylor Henley could be guilty too. Why would we as Christian individuals make up such stories?

The people at Baptist Memorials need help and if we can't get it from a Board of Trustees that is supposed to care about what happens here, maybe we can get it from others on the outside. You have a responsibility to the patients, their families, employees and Village and High Rise residents, but we won't sit back and be silent if you choose not to accept that responsibility. We have gone through many hours of prayer seeking deliverance and direction and our God will forgive us for what we're being forced to do...we're not so sure He'll be as forgiving where the Board of Trustees and Taylor Henley are concerned.

Our Prayers are With You,

CASE NO. CA6-89-0002-C
Mary Collins
VS. Baptist Memorials
PLAINTIFF'S EXHIBIT 27

September 9, 1988

Board of Trustees
Baptist Memorials Center
902 N. Main
San Angelo, Texas 76903

Dear Board Member:

I suppose this letter is being written in an attempt to call upon your collective consciences to put an end to the immoral and embarrassing situation you seem to be condoning here at Baptist Memorials Center.

A lot of us are having a hard time understanding how you as Board members and supposedly Christian individuals could allow Taylor Henley to continue being in control of Baptist Memorials and the lives of all of us who live here and those who work for the Center. In light of the fact that Taylor Henley's affair with Mary Butts has been brought to your attention (and can be substantiated if you care to research the question), we cannot understand how you can allow the situation to continue. And not only does Taylor Henley feel that he has put the Board in its place, now we must endure having our noses rubbed in this mess by Taylor Henley moving Mary Butts right here among us in the Village. And we are APPAULED (sic) to say the very least. It doesn't matter what Taylor Henley says in an attempt to justify his actions, the fact remains that Mary Butts is no more than a secretary with a great sounding job title and a terrific pay check. Maybe it's easy for you to

look the other way because you don't have to deal with it everyday, but there are a lot of us depending on you to do what is right. Please.....

We also do not understand how Taylor Henley can have an article placed in the local newspaper announcing a multi-million dollar expansion of the Center when this place is falling down around our ears. We have been taken advantage of and down right lied to by Taylor Henley and there are many of us who are looking around, and right now, Rio Concho is looking more appealing all the time.

If you don't care about what goes on here, maybe it is time to step aside and let someone else get involved and put an end to this tasteless situation. We need someone to care about us and a place that means so much to so many. Again, this letter is unsigned and I think that from the actions of the Board thus far, you can understand why. May God lead you to do what is right.

Yours in Christ

APPENDIX H

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

FILED
AUG 29 1991

MARY A. COLLINS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
BAPTIST MEMORIALS GERIATRIC CENTER and ODUS TAYLOR HENLEY,	)	
	)	Civil Action No.
Defendants.	)	CA-6-89-002-C

ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court submits and enters these additional findings of fact and conclusions of law, consistent with the Opinion and Order remanding such cause entered on August 2, 1991, by the Court of Appeals for the Fifth Circuit in Appeal No. 90-1396. This Court thereby makes the following findings of fact in reference to the Title VII claims of the Plaintiff:

1. By reference, this Court hereby adopts the former

findings made by the jury at the trial on this cause. Such answers to the jury questions are referred to and incorporated herein as if set forth in full.

2. This Court hereby further adopts by reference, as if set forth fully herein, its original findings of fact entered in this Court's Order dated May 3, 1990, and hereby supplements and submits these additional findings in reference to the quid pro quo theory claim alleging Title VII violations as propounded by the Plaintiff.

3. Ms. Collins, as a female employee of the Center, was a member of a protected group as defined under Title VII.

4. Ms. Collins was not subjected to sexual advances or requests for sexual favors. Ms. Collins was, however, subjected to unwelcome physical contact evidenced by Mr. Henley's embraces and/or hugs, during her early employment. Although Ms. Collins never rejected Henley's touchings, they were unsolicited and uninvited and, based upon the evidence submitted, this Court further finds that such contact was offensive to Ms. Collins. A majority of the female employees did not consider Henley's hugs as offensive.

5. This Court finds that the overwhelming evidence shows that Henley was a demonstrable person. The Court is convinced that Henley did hug and pat employees, residents and patients. The credible evidence shows that Henley hugged and patted males as well as females. However, the touchings which were sometimes perceived as offensive, were the touchings directed at female employees.

6. Although Ms. Collins found the hugging to be

offensive, personally, she never complained to Taylor Henley evidencing her disapproval. Ms. Collins' dissension and/or disapproval of Henley's physical conduct did not affect any tangible aspect of her compensation. Ms. Collins' disapproval of Henley's physical contacts did not affect any tangible aspect of Ms. Collins' terms, conditions or privileges of her employment. Ms. Collins received substantial raises commensurate with her responsibilities and performances while employed at the Center. This Court further finds that Ms. Collins was not denied any tangible benefits due to her rejection of the harassment. Ms. Collins' rejection of the harassment was not an express or implied condition to the receipt of any job benefit. Finally, Ms. Collins' termination from employment was not caused by Ms. Collins' rejection of the harassment by Henley, but rather was for insubordination and unsatisfactory performance of Ms. Collins.

7. There is no compelling evidence which suggests that tangible job benefits were tendered to other employees conditioned upon their acceptance of Henley's touchings or pettings. This Court is further not persuaded that Ms. Collins would have received higher raises had she accepted the harassment or been more receptive to Mr. Henley.

8. The credible evidence shows that Mary Butts received substantial salary raises and promotions based upon job performance. Credible evidence shows that Ms. Butts retained the responsibilities and duties of Executive Secretary even after her promotion to Assistant to the Executive Director and Retirement Administrator. Any promotions or remunerations were not disparately disproportionate to that of the other employees. This Court is convinced that Ms. Butts received salary increases commensurate with her increased responsibilities and duties.

This Court finds that proportionately similar salary increases during comparable time periods were granted to Kay Wright, Carolyn Owings, Gloria Hammond and Patricia Hiller which were based upon job responsibility and merit of performance. These increases were not affected by any acceptance or rejection of any sexual harassment. Therefore, after weighing the credibility of the evidence regarding this factual issue, the Court finds that there was no disparate treatment toward Ms. Collins as a result of her disapproval of the physical contact which she considered to be offensive. Although there is conflicting evidence, this Court finds that Ms. Collins was one of few who considered Henley's hugs inappropriate.

9. Although the Board of Trustees of the Center had notice of alleged sexual harassment, the evidence, given in its most credible light, suggests possible fraternizing between Henley and Ms. Butts. However, allegations contained in the letters forwarded to Bill Denton are incredulous when compared to the testimony presented at trial. Furthermore, this Court finds that Bill Denton and the Board investigated and attempted to substantiate the allegations of the improprieties of Henley. After weighing the credibility of the allegations, this Court finds that neither Henley nor the Center treated Ms. Collins or other employees disparately as a result of their acceptance or rejection of Henley's touchings and hugs.

CONCLUSIONS OF LAW

Any conclusion of law more properly characterized as a finding of fact shall be adopted as such. Any finding of fact more properly characterized as a conclusion of law shall be adopted as such.

Based upon the foregoing findings of fact, and those

previously adopted by reference herein, this Court makes the following conclusions of law in reference to the Plaintif's Title VII claims based upon the Plaintiff's alleged theory of quid pro quo.

1. This Court hereby applies the elements of proof necessary for the Plaintiff to establish a violation of Title VII on grounds of sexual harassment under a quid pro quo theory as outlined in *Jones v. Flagship International*, 793 F.2d 714 (5th Cir. 1986).

2. Therefore, this Court concludes that the Plaintiff, Collins, as a female employee, belongs to a protected group. Collins was briefly subjected to unwelcome sexual harassment consisting of Henley's hugs during her early employment with the Center. Even though this Court is convinced that such hugs were not intended as sexual in nature on the part of Mr. Henley, they were perceived as offensive by the Plaintiff.

3. This Court further concludes that the harassment consisting of the hugs and contacts perceived by the Plaintiff as offensive were based upon sex because the preponderance of the evidence shows that these hugs and embraces were performed upon female employees and not males. Therefore, this Court concludes that the alleged harassment or offensive touching was based upon sex.

4. Collins' rejection to Mr. Henley's physical contacts or huggings did not affect any tangible aspect of Collins' compensation, terms, conditions, or privileges of her employment. This Court further concludes that Collins' rejection of the harassment was neither an express nor an implied condition to the receipt of any job benefit nor was it a cause of her termination from the Center. In addition, this Court concludes that Collins was not denied any tangi-

ble job benefits nor did she receive the reprimands from Henley because of her rejection to his sexual harassment.

5. This Court further concludes that since there was no causal connection between Collins' rejection of the sexual harassment which affected any of the tangible aspects of her employment, which absolves Henley of any liability for sexual harassment under Title VII based upon quid pro quo, then, as such, the Center is not liable to Collins under the theory of respondeat superior.

This Court, upon further review of the evidence, hereby concludes that the Plaintiff has not sustained her burden of proving her case of sexual harassment as defined under Title VII under the quid pro quo theory.

Dated August 29, 1991.

/s/ Sam R. Cummings

SAM R. CUMMINGS
United States District Judge

Supreme Court, U.S.
FILED
JAN 3 1992
OFFICE OF THE CLERK

(2)

No. 91-840

In The

Supreme Court of the United States

October Term, 1991

MARY A. COLLINS,

Petitioner,

v.

BAPTIST MEMORIALS GERIATRIC CENTER and ODUS TAYLOR HENLEY,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF CASE 2

REASONS THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED 9

I. TITLE VII AND SUPREME COURT PRECEDENT REQUIRE EMPLOYERS TO CLEARLY SET FORTH SPECIFIC LEGITIMATE REASONS FOR TERMINATING AN EMPLOYEE ONLY WHEN A CLAIMANT SUCCESSFULLY ESTABLISHES A PRIMA FACIE CASE OF DISCRIMINATION. THE FIFTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH SUCH PRECEDENT 9

II. MARY COLLINS, AS AN AGGRIEVED EMPLOYEE, HAS BEEN PROVIDED ADEQUATE OPPORTUNITY TO PROVE THAT THE REASON GIVEN FOR HER FIRING WAS PRETEXTUAL BY SHOWING DIRECTLY OR INDIRECTLY THAT THE EMPLOYER'S PROFFERED EXPLANATION WAS PRETEXTUAL. THERE IS NO CONFLICT BETWEEN THE FIFTH CIRCUIT'S OPINION AND PRIOR DECISIONS OF THE SUPREME COURT AND OTHER CIRCUITS 14

TABLE OF CONTENTS – Continued

Page

III. THE FIFTH CIRCUIT IMPOSED THE STANDARDS CONSISTENT WITH STARE DECISIS REGARDING COLLINS' PROOF THAT THE HOSTILE WORKING ENVIRONMENT AFFECTED A TERM OR CONDITION OR PRIVILEGE OF HER EMPLOYMENT. THE FIFTH CIRCUIT'S STANDARD OF PROOF DOES NOT CONFLICT WITH SUPREME COURT PRECEDENT 18

IV. THE FIFTH CIRCUIT DID NOT ERR BY ALLOWING THE DISTRICT COURT TO ADOPT THE NON-ADVISORY JURY'S FINDINGS ON STATE LAW ISSUES AND APPLY THOSE DETERMINATIONS ON THE FEDERAL LAW ISSUES WHEN ANALYZED UNDER THE APPROPRIATE TITLE VII STANDARDS AND BURDEN-SHIFTING GUIDELINES 22

V. THE FIFTH CIRCUIT DID NOT ERR IN CONDUCTING ITS PLENARY REVIEW OF THE DISTRICT COURT'S CONCLUSION THAT COLLINS DID NOT PROVE HER SEXUAL HARASSMENT CLAIMS AGAINST THE DEFENDANTS 26

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985)..... 26

Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978) .13, 22

Collins v. Baptist Memorials Geriatric Center, 937 F.2d 190 (5th Cir. 1991)..... *passim*

Furnco Construction Corp. v. Waters, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978)..... 15

Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).....19, 21

Jack v. Texaco Research Center, 743 F.2d 1129 (5th Cir. 1984) 11

Jones v. Flagship Intern., 793 F.2d 714 (5th Cir. 1986) 19, 20, 21

Jordan v. Clark, 847 F.2d 1368 (9th Cir. 1988)..... 26

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).....10, 15

McKnight v. General Motors Corp., 908 F.2d 104 (7th Cir.), *cert. denied* ___ U.S. ___, 111 S.Ct. 13076, 113 L.Ed.2d 241 (1991)..... 24

Meritor Savings Bank v. Vinson, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986).....18, 19, 20, 21, 27

Pullman-Standard v. Swint, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982)..... 26

TABLE OF AUTHORITIES – Continued

Page

Rogers v. E.E.O.C., 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972) 18, 19, 20, 21, 28

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) ..... *passim*

United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983) 15, 25

STATUTES AND RULES

Federal Rules of Civil Procedure 52(a) 23

Tex. Rev. Civ. Stat. Ann. art. 4442c (Vernon 1976) 6

42 U.S.C. § 2000e – 2 (1964) 9

29 C.F.R. § 1604.11(b) (1985) 24

TREATISES

9 J. Wigmore, Evidence § 2489 (3rd Ed. 1940) 22

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Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, BAPTIST MEMORIALS GERIATRIC CENTER and ODUS TAYLOR HENLEY, respectfully request that this Court deny the Petition for Writ of Certiorari, which seeks review of the opinion of the United States Court of Appeals for the Fifth Circuit rendered in this proceeding on August 2, 1991, rehearing denied on August 29, 1991. That opinion is reported at 937 F.2d 190.

STATEMENT OF THE CASE

On March 21, 1988, Mary A. Collins, Personnel Director, was fired by Baptist Memorials Geriatric Center ("the Center"). She was fired by its Executive Director, Odus Taylor Henley ("Henley"). The Center is a large, multi-level retirement and medical care community for the care of retired and elderly persons, located in San Angelo, Texas. Henley was the top officer of the corporation and had presided as such since 1971. The Center has a total of 660 residents, over 300 employees, some 275 of whom are women. Mary A. Collins ("Collins") was hired as Personnel Director of the Center on February 17, 1986. Her employment with the Center was for no set term and was subject to termination without notice on the part of either Collins or the Center. At the time of trial, Collins had attended high school and subsequently obtained her G.E.D.; Collins was 43 years old and had no college degree, but had attended various management training seminars and court reporting schools. At the time of trial, Henley was 72 years old, possessed an undergraduate degree from Howard Payne University and a Divinity Degree from Southwest Baptist Seminary. He also received an Honorary Doctorate Degree from Howard Payne. A highly decorated World War II veteran, Henley served as a Baptist minister for twelve and a half years before joining the Center in 1962. Henley has been in the ministry continuously for 53 years. The Center's nursing home received a superior rating from the Department of Health in 1988, the same year as Collins' termination, which is the highest rating possible in the State of Texas. The Center is the largest center in any one location in the

entire Southern Baptist Convention. It serves all denominations and is a charity open to all persons regardless of their ability to pay.

Collins' starting salary of $16,120.00 as Personnel Director was the highest starting wage that any Personnel Director had received at the Center. After going to work at the Center, Collins worked closely with Mr. Vic Rhoads ("Rhoads"), the Executive Vice-President of the Center. In the course of time, it was assumed that Rhoads (age 39) would replace Henley as the Center's Executive Director. However, Rhoads was terminated at the Center in 1987, and Collins' and Henley's working relationship deteriorated thereafter. Collins developed a hostile attitude towards Henley and there were personality clashes between the two.

Collins received reprimands and warnings on February 15, 1988, and March 11, 1988, for approval and request for unauthorized salary advances to employees over a period of time and for assuming authority which had been specifically forbidden and reserved only to the Executive Director who was on duty or the Executive Vice-President. She received an additional reprimand for insubordination, specifically for approving cash advances to employees without executive approval, and on March 21, 1988, was then terminated.

Collins claims that because she would not let Henley hug her during the first four or five months of her employment at the Center, that he became angry with her and that their relationship deteriorated. Her personnel evaluations from Henley actually showed that during her initial employment at the Center, he rated her as a very

good employee (R. 469, 473). Although Collins claimed that she was working in a hostile environment at the Center, she recommended Baptist Memorial as a good place to work to both relatives and friends (Transcript, "T.", 979, 980, 981). Collins first sought legal advice when Henley began giving her reprimands in early 1988. Prior to her termination, she also called the E.E.O.C. and was advised to document the things that were happening to her. Accordingly, Collins prepared and filed various memos to her personnel file documenting her clashes with Henley at the Center. These memos were complaints by Collins primarily concerning salary matters and perceived rudeness to her on the part of Henley. Collins also documented her rebuttal to the reprimands that she received on February 15, 1988 and on March 11, 1988. She complained of her lack of authority in her position and that Henley always needed to blame someone. She complained that she was the scapegoat and she considered the reprimands to be personal attacks upon her. In none of the rebuttals are any claims made of sexual discrimination or misconduct on the part of Henley. However, Collins did observe Henley to touch and hug various employees and patients at the Center and she considered these touchings to be offensive.

In late 1987 and early 1988, the Trustees of the Center began to receive numerous anonymous letters as well as telephone calls of complaint about Henley's administration of the Center as well as claims that Henley and Mary Butts ("Butts") were having an affair. There were also complaints that Henley was offensive in the way he hugged women at the Center. Butts was a 56 year old Executive Secretary and Retirement Administrator at the

Center. She was hired at the Center on September 7, 1982, as Executive Secretary to Henley and was promoted to Retirement Administrator on December 29, 1985, prior to the employment of Collins at the Center.

Prior to her termination, Collins approached a Board Member of the Center, Mr. Bill Denton ("Denton"), complaining of sexual harassment by Henley. Denton stated that the Board needed facts to work with from the people who had witnessed any improprieties and said that he could not go to the Board with simply anonymous complaints. Thereafter, Collins began gathering statements to turn over to Denton concerning various complaints. These complaints were unsigned and were delivered to Mr. Denton on March 21, 1988. These are attached to Petitioner's Brief as Appendix "F".

Denton delivered these unsigned complaints against Henley to Frank Sanders ("Sanders"), the Chairman of the Board of Trustees of the Center, on March 21, 1988. At no time did Denton tell Mr. Sanders nor Henley the name of the person who had delivered the complaints to him. In fact, there was no evidence that Henley was even aware that any complaints against him from anyone had been delivered to Sanders prior to Collins' termination. That same afternoon of March 21, 1988, however, Collins was terminated by Henley for insubordination. Sanders first learned that Collins had provided the various complaints to Denton after her termination. He met with Collins and Denton on April 5, 1988, at his office. He was told at that time by Collins that there were people who were willing to come forward and tell the Board their complaints contained in their various unsigned letters. Sanders, Chairman of the Board of Trustees, had also

received anonymous phone calls, one specific call in which a male voice used curt language suggesting that Sanders get rid of Henley. During the April 5, 1988, meeting, Collins also informed Sanders that she had retained an attorney to represent her.

A meeting of the Executive Committee of the Board of Trustees was called by Sanders on April 12, 1988, at 1:30 p.m. to deal with the anonymous allegations that the Board had been receiving, both over the phones and through the mail. Collins was given the opportunity to appear and bring anyone who wanted to voice a complaint against Henley or the Center and to speak to the Board Members. Collins was informed on April 5, 1988, that Henley would also have the right to be present. On April 12, 1988, the meeting of the Executive Committee and the Board of Trustees was held to discuss the many anonymous letters and telephone calls regarding the character and capability of the Executive Director, Henley. However, Collins and any witnesses who had any complaint failed to appear. As a result, there was no one to substantiate the accusations.

Continuing to build a case after her termination, Collins proceeded initially with the E.E.O.C., and obtained the right to sue and did sue the Center and Henley on January 17, 1989. Trial proceeded in San Angelo, Texas, on April 9 through 13, 1990, with the Title VII matters being tried to the District Court. The various state law issues including her claims of wrongful termination, defamation, fraud, and of violations of Article 4442c[1] were submitted to the jury. The Court and jury

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[1] Art. 4442c, Tex.Rev.Civ.Stat. Ann.; *now* Health & Safety Code §§ 242.001 – et seq. (Vernon's 1991).

heard extensive testimony from twenty-eight witnesses during the week of trial and had the opportunity to evaluate their credibility.

On May 3, 1990, the District Court signed its Order making its Findings of Fact and Conclusions of Law with regard to Collins' Federal Law claims under Title VII. The Order is attached to Appellant's Petition as Appendix "D". The non-advisory jury found against Collins on all of the issues submitted except where it found that the Center failed to exercise ordinary care in the investigating and stopping alleged instances of sexual discrimination and harassment. However, the jury responded to Question No. 6 that the Center's failure to exercise such ordinary care was not the proximate cause of damages to Collins. The jury finding clearly indicated that there was no sexual discrimination and harassment, but the jury believed that the preferred method of investigation would have been to allow Collins and her witnesses to appear before the Board without Henley being present. Regarding the Federal Law claims, the District Court entered judgment in favor of Henley and the Center. The Judgment is attached to Appellant's Petition as Appendix "C". Collins then timely appealed the District Court's Order and Judgment to the United States Court of Appeals for the Fifth Circuit. On August 2, 1991, the Fifth Circuit affirmed the District Court's Judgment with regard to the retaliation and hostile environment claims, but remanded to the District Court further findings upon the quid pro quo claim. *Collins v. Baptist Memorials Geriatric Center*, 937 F.2d 190 (5th Cir. 1991) (hereinafter *"Collins"*). On August 29, 1991, the Fifth Circuit denied Collins' Petition for Rehearing. On the same date, the District Court entered Additional Findings of Fact and

Conclusions of Law submitted by the Defendants on remand. Those Additional Findings of Fact and Conclusions of Law are now the subject of a second appeal to the Fifth Circuit.

The issues presented by the Petition for Writ of Certiorari to this Court regard the decision of the Fifth Circuit affirming the District Court's Judgment and Order in favor of the Center and Henley on the retaliation and hostile environment claims. Through the course of a week-long trial, Collins had ample opportunity to present credible evidence to support her claims. Twenty-eight fact witnesses testified during the trial and voluminous documents were admitted, principally the anonymous and/or incredulous allegations alleging Henley's and Butts' adultery, Henley's improprieties and extortion of resident's estates by coercing bequests in patient's and resident's wills and, ultimately, that her termination was wrongful because it was in retaliation of her pursuing an activity protected under Title VII. Neither the Fifth Circuit nor the District Court ignored Collins' evidence that the insubordination reasons stated by the Center and Henley for firing her was clearly pretextual; the Fifth Circuit Opinion reflects, as does the District Court Order, that Collins failed to establish a prima facie case and thoroughly failed to meet the ultimate burden of persuasion regarding her retaliation and hostile environment claims. Collins is aggrieved by the fact finders' decisions and essentially has pursued her rights through her plea to obtain a new trial. The Fifth Circuit found that the District Court did not err in its Findings of Fact nor was it persuaded that the Lower Court ignored precedential Title VII standards and burden shifting guidelines.

Respondents urge that the true essence of this Appeal is the Plaintiff's objection to the District Court's and Fifth Circuit's weight afforded to the Plaintiff's proffered evidence, rather than a misapplication of the legal standards as Petitioner suggests.

REASONS THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

I. TITLE VII AND SUPREME COURT PRECEDENT REQUIRE EMPLOYERS TO CLEARLY SET FORTH SPECIFIC LEGITIMATE REASONS FOR TERMINATING AN EMPLOYEE ONLY WHEN A CLAIMANT SUCCESSFULLY ESTABLISHES A PRIMA FACIE CASE OF DISCRIMINATION. THE FIFTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH SUCH PRECEDENT.

Title VII, 42 U.S.C. § 2000e – 2 (1964), et. seq. protects employees in the workplace from sexual harassment by making it "unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . . ". The United States Supreme Court set forth the shifting burden of proof guidelines in a discrimination lawsuit which are as follows:

> First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." . . . Third, should the

> defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pre-text for discrimination.

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253-254, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207, 215 (1981) (hereinafter "*Burdine*"). Accord, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05, 93 S.Ct. 1817, 1825, 36 L.Ed.2d 668 (1973).

Collins was terminated from her employment with the Center on March 21, 1988, for insubordination. Earlier in the same day, she had delivered a compilation of letters which alleged adultery and sexual harassment of Henley to one of the Center's Trustees, Mr. Bill Denton. Later that same day, these letters were delivered by Denton to the Chairman of the Board of Trustees of the Center, Mr. Frank Sanders. At no time prior to the delivery of these letters, nor immediately before Collins' termination, did Mr. Denton inform either Sanders or Henley of the source of the letters. As the Fifth Circuit Court of Appeals recognized, this was Collins' weakest link in her prima facie case. Nevertheless, the Court of Appeals in its review, assumed inferentially that there was some causal connection between Collins' discharge and her Title VII protected activity.

The Court of Appeals acknowledged the issue of a causal connection between Collins' opposition to Henley and her termination and stated that the burden of production was on Collins to show that "'but for' the protected activity, she would not have been subjected to the action which she claims." *Collins, supra* at 193 n.7 [citing

Jack v. Texaco Research Center, 743 F.2d 1129, 1131 (5th Cir. 1984)]. Although Texas subscribes to the "at-will" doctrine regarding employment law, and under such doctrine Henley and the Center could terminate Collins without cause, Collins has urged that Henley's termination for insubordination was a pretext and, therefore, an insufficient rebuttal. However, live testimony during the trial showed that Henley, although he could not recall the specific instance, testified that Collins had approved cash advances and payroll advances in direct conflict with his prior reprimands and instruction. As Mr. Frank Merrill ("Merrill") testified, officers would usually sign the payroll checks and business drafts when presented by a staff person with the presumption that such drafts were authorized by their superiors or supervisors. Therefore, as Merrill testified, the documentary evidence produced at trial containing his or Henley's signatures were not necessarily "authorized". Hence, it would be very difficult if not impossible to produce any documentary direct evidence which would show Collins submitting payroll checks in advance which were "unauthorized", especially when Henley had earlier revoked the authorization for advance payroll drafts.

The United States Supreme Court in *Burdine, supra* at 254-256, set forth the burden placed on an employee to present evidence of its nondiscriminatory reasons in the face of Plaintiff's prima facie showing:

> . . . the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not

> persuade the court that it was actually motivated by the proffered reasons . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity.

Regarding the sufficiency of the rebuttal, the United States Supreme Court in *Burdine, supra* 257-258, further stated, "the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by a discriminatory animus." At trial, as the Court of Appeals noted in its Opinion, Henley was unable to identify the "final thing" that prompted him to terminate Collins. *Collins, supra* at 194. At trial, Henley corroborated Merrill's testimony stating that he could not produce any specific documents or instances showing Collins' insubordination, but testified that on March 21, 1988, after some deliberation concerning Collins' lack of congeniality and their conflict of personalities stemming from her bad attitude, Henley alone decided to and then terminated Collins. The specific legitimate reasons articulated were an accumulation of her bad attitude and a general unwillingness to accept direction. Henley testified that he began noticing her attitudes changing in late

1987 and attributed her attitude and ultimately her insubordination to the fact that she was not being allowed to run the personnel office at her discretion and control. This direct evidence was sufficient to rebut Collins' prima facie case which then shifted the intermediate burden of proof back to Collins. Concerning Defendants' rebuttal, the United States Supreme Court has not required the defendant to persuade the trial court that it was actually motivated by the proffered reasons, but rather that the defendant's evidence only raised a genuine issue of fact as to whether it discriminated against the plaintiff. *Burdine, supra* at 254; see also *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978). As the Supreme Court also stated in *Burdine, supra* at 256:

> We stated in *Sweeney* that "the employer's burden is satisfied if he simply 'explains what he has done' or 'produce[s] evidence of legitimate nondiscriminatory reason.'" 439 U.S. at 25, n.2, 58 L.Ed.2d 216, 99 S.Ct. 295, quoting *id.*, at 28, 29, 58 L.Ed.2d 216, 99 S.Ct. 295 (Stephens, J., dissenting).

Although Henley was unable to cite any specific cash advances or payroll check advances which Collins issued in direct conflict with Henley's instruction, there was great volume of evidence which showed that Collins was simply unhappy because she was not allowed to run the personnel office as she saw proper. The insubordination was based upon her resentment of Henley's direction.

Collins was provided the opportunity and did present evidence attempting to show that the reasons for her termination were a mere pretext; however, the ultimate

burden of persuasion remained hers. The jury and District Court had five days of testimony and ample evidence to weigh the credibility of the key issue regarding a retaliatory motive on the part of Henley. Collins failed to meet her ultimate burden. Title VII does not require employers to specifically document instances of employee's bad attitudes, insubordination and rejection of authority, to support and justify an employee's termination, when such termination is based upon legal justification. Such requirement in itself can create a hostile work environment where the only practical purpose that such practice may serve is to preserve defensive evidence for potential Title VII lawsuits. Retaliatory motives by a discriminating employer can best be ferreted by the trier of fact. For these reasons, the Writ of Certiorari should be denied.

II. MARY COLLINS, AS AN AGGRIEVED EMPLOYEE, HAS BEEN PROVIDED ADEQUATE OPPORTUNITY TO PROVE THAT THE REASON GIVEN FOR HER FIRING WAS PRETEXTUAL BY SHOWING DIRECTLY OR INDIRECTLY THAT THE EMPLOYER'S PROFFERED EXPLANATION WAS PRETEXTUAL. THERE IS NO CONFLICT BETWEEN THE FIFTH CIRCUIT'S OPINION AND PRIOR DECISIONS OF THE SUPREME COURT AND OTHER CIRCUITS.

In *Burdine, supra,* the United States Supreme Court stated that a plaintiff may succeed in showing pretext "either directly by persuading the Court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered

explanation is unworthy of credence." *Burdine, supra* at 256. See *McDonnell Douglas Corp. v. Green, supra* at 804-805. Both forms of proving discriminatory intent were available and utilized by Collins at trial.

Throughout her petition, Collins has attempted to erode the jury's and District Court's fact finding mission and analyze it with a technocratic review of the burden shifting guidelines as announced in *Burdine*. However, the United States Supreme Court has stated that the "prima facie case method established in *McDonnell Douglas* was 'never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.'" *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. 1478, 75 L.Ed.2d 403, 410 (1983) ("Aikens"), quoting *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978).

The Fifth Circuit, in the present opinion, regarding the issue of retaliatory motive, commented on the direct and indirect (circumstantial evidence) proofs. The Fifth Circuit stated in *Collins, supra* at 194:

> In sum, the evidence produced at trial was complex, confusing and even contradictory. The resolution of the retaliatory motive issue turned largely on *credibility choices*. (emphasis added).

The Fifth Circuit did not use or apply any standard that limited Collins to prove directly that a discriminatory reason more likely motivated the employer. As Collins concedes, the "leak" conversation was direct evidence and was contradicted with opposing direct evidence. The

Fifth Circuit did not ignore the pretext evidence under the indirect method allowed by the Supreme Court. Presumably, the indirect method and pretext evidence was contradicted by direct evidence which showed that Henley had no knowledge of Collins' presumably protected activities prior to her termination. The "leak" evidence was discredited by the direct evidence which showed that Sanders did not receive the letters gathered by Collins until the afternoon immediately after her termination.

Concerning the indirect proof of the retaliatory motive urged by the Petitioner, the Fifth Circuit discussed at length the direct and circumstantial evidence regarding the Center's and Henley's proffered explanation for the termination of Collins. *Collins*, at 193-95. Henley and the Center specifically stated that Collins was terminated for insubordination, specifically for her unauthorized issuance and approval of payroll checks and cash advances. Although Henley was unable to cite specific instances of Collins' insubordination, his testimony evidenced the conflict of personalities which existed and had grown between he and Collins. These hostilities were not based upon any sexual harassment, but were due to Collins' rejection of Henley's authority. Several of the Center's witnesses testified to the nature of their relationship. Kay Wright testified that Collins had told her on March 21, 1988, "This is the day I will be fired." The Center was not required to issue three reprimands to terminate Collins. As the record reveals, Collins as an "at-will" employee could be terminated at any time for any nondiscriminatory reason. As Henley stated during his testimony, Collins was continuing to exhibit simply a bad attitude

regarding how the personnel division and/or the Center should be operated. Collins alleges that she discredited the cash advances and early paycheck issuances and labels them as "hoaxes" put forth by the Center and Henley. Obviously, neither the jury nor the District Court felt that there was any "hoax" involved. The testimony of Merrill, Henley and Sanders consistently showed that although many times the Center's checks and disbursements may have had appropriate signatures, the existence of signatures on the drafts was not necessarily evidence of authorization. Merrill's testimony regarding the conversations with Henley on the morning of Collins' termination was corroborated with Henley's testimony where the early issuance of drafts by Collins was again discussed immediately prior to her termination. The Center's and Henley's proffered explanation of the insubordination, bad attitude and non-congenial personality was substantiated and worthy of credence as the trier of fact afforded it.

In summary, Collins has attempted to distort the Fifth Circuit's decision by twisting its analysis under the burden shifting guidelines as addressed in *Burdine*. However, as previously mentioned, those guidelines were never intended to be technocratic nor rigid hurdles to distort the burden placed upon the plaintiff at trial. All of the evidence was before the District Court and the ultimate decision based upon its fact findings was left and decided by the District Court whether or not the Defendants intentionally discriminated against the Plaintiff, Collins. Collins, in effect, has requested this High Court to grant her Petition and review the case, and, in essence, requests that this Court sit as a trier of fact to re-evaluate

all the evidence submitted on the record to the Fifth Circuit Court of Appeals. The United States Supreme Court should deny Appellant's Petition, and uphold the Fifth Circuit Court of Appeals' decision where the Appellate Opinion reflects that the alternate methods of proof by Collins were available and scrutinized, and thereby affirming the District Court's judgment against Collins.

III. THE FIFTH CIRCUIT IMPOSED THE STANDARDS CONSISTENT WITH STARE DECISIS REGARDING COLLINS' PROOF THAT THE HOSTILE WORKING ENVIRONMENT AFFECTED A TERM OR CONDITION OR PRIVILEGE OF HER EMPLOYMENT. THE FIFTH CIRCUIT'S STANDARD OF PROOF DOES NOT CONFLICT WITH SUPREME COURT PRECEDENT.

In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) (*"Meritor"*), the United States Supreme Court acknowledged that *Rogers v. E.E.O.C.*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972), "was apparently the first case to recognize a cause of action based upon a discriminatory work environment." The Court in *Meritor, supra* at 66, quoted excerpts from Justice Goldberg's (Fifth Circuit) Opinion in *Rogers, supra* at 238:

> [T]he phrase 'terms, conditions or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.

> . . . One can readily envision working environment's so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers. . . .

Following the *Rogers* case, the Fifth Circuit continued to recognize psychological harm as a viable claim under the hostile work environment theory. In *Jones v. Flagship Intern.*, 793 F.2d 714 (5th Cir. 1986), that Court stated, "while an employee need not prove tangible job detriment to establish a sexual harassment claim, the absence of such detriment requires a commensurately higher showing that the sexually harassing conduct was pervasive and destructive of the working environment." *Jones, supra* at 720. However, the United States Supreme Court has also recognized and affirmed that, "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII." *Meritor, supra* at 67, citing *Rogers v. E.E.O.C., supra* at 238. Concerning the severity of the sexual harassment, the Supreme Court further went on to state that, "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' " *Meritor, supra* at 67, quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982).

The analysis of the severity or persistence of the sexual harassment at a particular workplace, sufficient to affect seriously the psychological well being of an employee, is to be determined with regard to the totality

of the circumstances. *Jones, supra* at 720; *Henson, supra* at 904.

In the present Opinion, the Fifth Circuit acknowledged its review of the pervasiveness of the alleged sexual harassment considering the totality of the circumstances, where it stated:

> At trial the weakest link in Collins' hostile environment claim became the issue of whether any physical contacts of Henley with other female employees altered a term of Collins' employment. . . . [A] claim based on psychological harm 'requires a commensurately higher showing that the sexually harassing conduct was pervasive and destructive of the working environment.'

Collins, supra at 195.

Since proof of the psychological effect upon Collins was at issue, it was necessarily her burden to show that the effect was deleterious to the entire working environment, i.e. in and among other employees. The burden of showing or producing such evidence remained on Collins, per the authority of *Rogers, Meritor,* and *Jones.* The District Court was not persuaded by Collins' evidence that any conduct of Henley had created an environment so hostile that any alleged sexual harassment affected the work ethic or environs at the Center.

Collins' evidence at trial regarding the hostile environment was far less than compelling. The jury and District Court heard all of the testimony through the five day proceeding. The trier of fact had sufficient evidence to make all reasonable inferences from direct and circumstantial evidence regarding Henley's "gropings" of

women. However, the District Court and the jury, *did not* believe Collins' allegations. The only credence the fact finders afforded her was that the Center was negligent in investigating and stopping alleged instances of sexual discrimination and harassment. See Petitioner's Appendix "E".

Collins' hostile environment claim was largely discredited by the very evidence she purports was compelling – the group of letters she gathered and delivered to the Center's Trustee. Regarding these memorandums and letters, most of them were unsigned, and those that were signed, were totally discredited by impeachment evidence at trial. See Petitioner's Appendix "F".

The Fifth Circuit Court of Appeals, the Court which first recognized hostile work environment as a viable theory of recovery under Title VII, has not departed from prior precedent. The standards it has applied in its review regarding the burden of showing reflect the mandate that a trial court should rule on the ultimate issue of discrimination based upon the totality of circumstances. These standards are consistent with the United States Supreme Court and other Circuit Courts as evidenced by the line of cases of *Rogers, Meritor, Jones, Henson*, et. seq. The Petition for Writ of Certiorari should be therefore denied.

IV. THE FIFTH CIRCUIT DID NOT ERR BY ALLOWING THE DISTRICT COURT TO ADOPT THE NON-ADVISORY JURY'S FINDINGS ON STATE LAW ISSUES AND APPLY THOSE DETERMINATIONS ON THE FEDERAL LAW ISSUES WHEN ANALYZED UNDER THE APPROPRIATE TITLE VII STANDARDS AND BURDEN-SHIFTING GUIDELINES.

Collins alleges that the District Court's adoption of a non-advisory jury's findings of fact was clear error for the reason that the District Court did not instruct the jury on the appropriate burden shifting guidelines under *Burdine*. The jury was not seated as an advisory jury for the Title VII claims. The jury was impaneled to review and decide the factual issues regarding the state law causes of action. As the Fifth Circuit noted, the District Court's ultimate findings are adequately supported by the jury's findings where the jury found that Collins was not fired for reporting acts of harassment and discrimination. Regardless of the burden shifting allocations, the ultimate burden of persuasion remained on Collins. In this regard, Collins failed. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. *Burdine, supra* at 253, citing *Board of Trustees of Keene State College, supra* at 25, n.2; also, 9 J. Wigmore, Evidence § 2489 (3rd Ed. 1940).

Collins' Petition for Writ of Certiorari goes into explicit detail to show that the state law issues presented to the jury were not parallel issues to the Title VII claims. The legal rationale justifying the specific questions is irrelevant when a court instructs a jury. The fact that the

wrongful discharge questions were premised on exceptions to the "at-will" doctrine plays no relevant part in the jury's deliberation of the Court's Charge and specific instructions. Collins alludes that jury Question No. 1 was not a parallel question to any Title VII issue.[2] However, as the Fifth Circuit analyzed, the jury was properly instructed with viable definitions regarding the state law claims. See Petitioner's Appendix "E". Collins also claims that it was error for the Fifth Circuit to allow the District Court to substitute the jury's findings of fact for those of its own, especially where the jury questions submitted allegedly were misaligned to the intricate, sensitive questions posed under Title VII. However, Collins fails to note that nowhere in the record did the District Court substitute the jury findings for those of its own. The District Court did not abdicate its fact finding obligations, rather it deferred credibility choices on the relevant parallel claims to that of the jury. This was not error. Jury Question No. 1 regarding the wrongful termination for Collins is precisely the same which might be presented to decide a Title VII retaliation issue. The instructions given to the jury and the questions themselves were sufficient enough under their clear, unequivocal meaning for the District Court to adopt as subsidiary findings of fact for which the Court of Appeals could review under the "clearly erroneous" rule of Rule 52(a) of the Federal Rules of Civil Procedure.

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[2] Question No. 1 to the jury was, "Was Mary Collins wrongfully terminated by the Center for reporting acts of harassment and discrimination?" The jury answered, "No".

Collins has great difficulty accepting that the Fifth Circuit only inferred from the jury's findings that Collins was not fired for reporting acts of harassment and discrimination. The resolution of that factual issue was not speculated by the jury nor the District Court. The Findings of Fact and Conclusions of Law entered by the District Court compelled the same result as that derived by the Fifth Circuit, that Collins was fired for legitimate, nondiscriminatory reasons. Regarding the jury foreman's question requesting the Court to define sexual harassment, the District Court responded by instructing the jury with detailed and comprehensive definitions derived from United States Supreme Court case law and E.E.O.C. regulations. See 29 C.F.R. § 1604.11(b) (1985). The instructions were not "loosely based" nor ambiguous. The instruction given outlines the essential elements of hostile work environment, quid pro quo and retaliation theories of recovery under Title VII. A copy of the District Court's supplementary instruction defining sexual harassment is attached as Respondents' Appendix "A". Furthermore, the supplemental instruction provided to the jury evidences the District Court's understanding and sensitivity to the Title VII sexual harassment definition. The burden shifting guidelines were not required to be instructed as the jury was not acting in an advisory capacity. The assertion by Collins that the Fifth Circuit erred in relying on *McKnight v. General Motors Corp.*, 908 F.2d 104, 113 (7th Cir.), *cert. denied* ___ U.S. ___, 111 S.Ct. 13076, 113 L.Ed.2d 241 (1991), in determining that a remand for further findings was not required where it was clear from the record and the jury's verdict what specific issues the jury decided. Collins discussion that the specific jury findings

may well not have been made dependent upon credibility determinations is totally absurd. The entire trial was based on credibility determinations. The jury's response to Question No. 1 did not pivot upon the jury defining what "type of reports" Collins submitted. As Petitioner's Appendix "F" shows, the reports Collins submitted all allude to alleged adultery and physical contacts of Henley at the Center. There can be no question what the jury's determination was in this regard. Their answer illustrates their choice of credibility on the issue of whether Collins was discharged because of her purported protected activity.

The District Court's and Fifth Circuit's discretion to utilize the jury as subsidiary fact finders was not abused. The assertion that the Plaintiff could have submitted Title VII definitions and burden shifting guidelines is without merit. The supplemental instruction given defining sexual harassment was based upon Title VII criteria and definitions. Collins did not object the supplemental instruction at trial, nor did the Defendants. As the United States Supreme Court stated in *Aikens, supra* at 716, 411:

> [T]he District Court must decide which party's explanation of the employer's motivation it believes. All Courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. . . . But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern 'the basic allocation of burdens and

> order of presentation of proof,' *Burdine*, 450 U.S., at 252, 67 L.Ed.2d 207, 101 S.Ct. 1089, in deciding this ultimate question.

As the fact finder of the Title VII claims, the District Court did not err in adopting the jury's findings and applying those findings to the determination of the ultimate legal issues.

V. THE FIFTH CIRCUIT DID NOT ERR IN CONDUCTING ITS PLENARY REVIEW OF THE DISTRICT COURT'S CONCLUSION THAT COLLINS DID NOT PROVE HER SEXUAL HARASSMENT CLAIMS AGAINST THE DEFENDANTS.

As the United States Supreme Court has stated, an Appellate Court can reverse a Trial Court's decision where it finds that the Trial Court's "findings of fact are clearly erroneous" as set forth in Federal Rule of Civil Procedure 52(a). *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). However, ultimate findings of fact regarding Title VII sexual harassment are subject to an Appellate Court's plenary review as such are mixed conclusions of law and fact. The Fifth Circuit Court of Appeals in its present Opinion recognized and applied the appropriate standard of review where it stated, "The district court's finding is a mixed conclusion of law and fact, subject to the independent review of this Court." *Collins, supra* at 195 n.16., citing *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19, 102 S.Ct. 1781, 1790 n.19, 72 L.Ed.2d 66 (1982); *Jordan v. Clark*, 847 F.2d 1368, 1375 n.5 (9th Cir. 1988).

Upon its plenary review, the Court of Appeals concluded that the jury was persuaded that sexual harassment did occur, crediting Collins' witnesses. However, Respondents deny that the jury answers indicate that they made any such finding. Nevertheless, as the Court of Appeals recognized, even with such finding, "not all workplace conduct that may be described as 'harassment' affects a 'term, condition or privilege' of employment within the meaning of Title VII." *Meritor, supra* at 67.

Collins urges that the independent findings submitted by the District Court evidence its misunderstanding of the law and application of the improper standards in analyzing the Title VII claim. However, Collins fails to acknowledge the sexual harassment definition and instruction which was presented to the jury, attached as Petitioner's Appendix "A". Collins did not object to such a broad definition being presented to the jury and should not be allowed to raise the issue for the first time on appeal. The Respondents' failure to object potentially jeopardized their state law defense. The only finding made by the jury and the District Court was that the Center was negligent in investigating and stopping *alleged* instances of sexual discrimination and harassment. Respondents urge, as the District Court obviously held, that the jury found that the Center was negligent in its investigation of Collins' claims, not that Collins was discharged in retaliation. Respondents disagree that the Fifth Circuit was obligated to remand this case for further findings of fact where the Fifth Circuit stated:

> "[if] it is clear from the record and the jury's verdict what the jury must have found and therefore what the District Judge, in registering

> agreement with the verdict, must also have found, a remand for explicit findings is not required, because it would add nothing to the information that the Appellate Court already has."

Collins, supra at 195 n.12.

The Fifth Circuit, in analyzing the retaliation and hostile environment claims, did not err for failing to reverse and remand for further findings under the precedential framework established by this Court. Regardless of the burden shifting guidelines announced in *Burdine* and other cases, Collins failed to meet her ultimate burden of persuasion on all issues. There is insufficient evidence to suggest that the District Court applied the erroneous standards relevant to the Title VII claims. Therefore, the United States Supreme Court should deny Petitioner's Writ of Certiorari.

CONCLUSION

As Collins fails to acknowledge, the Fifth Circuit Court of Appeals has been in the forefront of sexual discrimination law for many years. In fact, it was that Honorable Court's decision in *Rogers, supra,* which first recognized the hostile work environment theory in sexual harassment cases. The Court of Appeals and District Courts within Texas illustrate that they are fully cognizant of the Title VII guidelines and sensitivities. In that same regard, these courts recognize the basic liberties inherent in Texas' "at-will" doctrine which provides an employer the right to terminate any employee for any

cause or no cause at all. This liberty should not be restricted, save and except where such liberty invades such civil rights as those protected under Title VII. Requiring employers to fully document their personnel files regarding every aspect of employment decisions, creates an inherently suspect and hostile work environment. Employers should not be required to justify otherwise legitimate employment decisions for terminating employees such as Collins where a minority employee is discharged for insubordination stemming from her bad attitude, lack of congenial accord among employees, and total disregard of her superior's instructions; this is especially so when her animosity has no causal connection to sexual harassment and/or discrimination.

For these reasons, Respondents would respectfully request that the United States Supreme Court deny this Petition for Writ of Certiorari and affirm the Fifth Circuit's decision in favor of the Defendants in all regards.

Respectfully submitted,

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RESPONDENTS' APPENDIX "A"

(Filed Apr. 13, 1990)

Members of the Jury:

In response to your note #1, please be advised that Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

In determining whether alleged conduct constitutes sexual harassment, the Jury may look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

/s/ Sam R. Cummings
U.S. District Judge